



## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

#### 43 CFR Part 10

[NPS-WASO-NAGPRA-33190; PPWOCRADN0-PCU00RP14.550000]

RIN 1024-AE19

### **Native American Graves Protection and Repatriation Act Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony**

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Interior proposes to revise regulations to improve implementation of the Native American Graves Protection and Repatriation Act of 1990. These proposed regulations would clarify and improve upon the systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The proposed changes would provide a step-by-step roadmap for museums and Federal agencies to comply with requirements within specific timelines to facilitate the required disposition and repatriation. The proposed changes would describe the processes in accessible language with clear timelines and terms, reduce ambiguity, and improve efficiency in meeting the requirements. In addition, the proposed changes emphasize consultation in every step and defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

**DATES:** Comments on the proposed rule must be received by 11:59 PM EDT on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Federal Advisory Committee Act Meetings:* The Native American Graves Protection and Repatriation Review Committee (Review Committee) will meet virtually during the comment period. The National Park Service will announce the exact dates and times of the Review Committee meetings in the *Federal Register*, once scheduled. These meetings will be open to the public and there will be time for public comment.

*Tribal Consultation Sessions:* The Department of the Interior will conduct consultation sessions with Indian Tribes virtually during the comment period. The Department of the Interior will announce the exact meeting dates and times of the consultation sessions, once scheduled, on <https://www.doi.gov/priorities/tribal-consultation/upcoming-tribal-consultations> and by letter to Tribal leaders.

*Native Hawaiian Consultation Sessions:* The Department of the Interior will conduct consultation sessions with the Native Hawaiian Community virtually during the comment period. The Department of the Interior's Office of Native Hawaiian Relations will invite the Native Hawaiian Community to participate and provide the exact meeting dates and times of the consultation sessions, once scheduled.

*Public Listening Sessions:* The Department of the Interior will host virtual listening sessions during the comment period. The National Park Service will announce the exact dates and times of the listening sessions, once scheduled, on

<https://www.nps.gov/orgs/1335/events.htm>. These meetings will be open to the public.

*Information Collection Requirements:* If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to decide concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the *Federal Register*. Therefore, comments should be submitted to OMB by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments, identified by the Regulation

Identifier Number (RIN) 1024-AE19, by any one of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail to: National NAGPRA Program, National Park Service, 1849 C Street NW  
Mail Stop 7360, Washington DC 20240. Attn: Melanie O'Brien, Manager  
NAGPRA Rule Comments.

*Instructions:* All submissions received must include the words "National Park Service" or "NPS" and the RIN (1024-AE19) for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. Written comments will not be accepted by fax, email, or in any way other than those specified above. The NPS will not accept bulk comments in any format (hard copy or electronic) submitted on behalf of others.

*Oral Comments:* Register for opportunities to make oral comments at:

<https://www.nps.gov/orgs/1335/events.htm>. The consultation sessions listed above are for federally recognized Indian Tribes and for representatives of the Native Hawaiian Community. All oral comments by other members of the public must be made during specified sessions of the Review Committee meetings or public listening sessions. Oral comments will be recorded and submitted for the record and oral commenters should include a written copy of their statement prior to the public meeting. Time for oral comments may be limited.

*Information Collection Requirements:* Written comments and suggestions on the information collection requirements should be submitted by the date specified above in DATES to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting "Currently under Review - Open for Public Comments" or by using the search function. Please provide a copy of your comments to the NPS

Information Collection Clearance Officer (ADIR-ICCO), 12201 Sunrise Valley Drive, Reston, VA 20191. Please include “1024–AE19” in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** Melanie O’Brien, National NAGPRA Program, National Park Service, (202) 354-2201, melanie\_o'brien@nps.gov. Questions regarding the NPS’s information collection request may be submitted to Phadrea Ponds, NPS Information Collection Clearance Officer, phadrea\_ponds@nps.gov. Please include “1024–AE19” in the subject line of your email request.

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## **I. Background**

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA or Act) (25 U.S.C. 3001 *et seq.*) requires the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants, Indian Tribes, and Native Hawaiian organizations (NHOs). The Act governs the disposition of human remains or cultural items removed from Federal or Tribal lands (25 U.S.C. 3002); requires the inventory of human remains and associated funerary objects in holdings or collections (25 U.S.C. 3003); requires a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony in holdings or collections (25 U.S.C. 3004); governs the repatriation of human remains or cultural items in holdings or collections (25 U.S.C. 3005); creates a Federal advisory committee to monitor and review the inventory and identification process and repatriation activities (25 U.S.C. 3006); and authorizes civil penalties for museums that fail to comply with the Act (25 U.S.C. 3007).

## **II. Previous Federal Actions**

The Secretary of the Interior (Secretary) is responsible for implementation of the Act, including the issuance of regulations implementing and interpreting its provisions (25 U.S.C. 3011). The regulations are codified at 43 CFR part 10. The Department of the Interior (Department) published the initial rule to implement NAGPRA in 1995 at 60 FR 62134 (December 4, 1995). Subsequently, the Department published additional rules concerning:

- Civil penalties, at 68 FR 16354 (April 3, 2003);
- Future applicability, at 72 FR 13184 (March 21, 2007);
- Culturally unidentifiable human remains, at 75 FR 12378 (March 15, 2010);
- Technical amendments, at 78 FR 27078 (May 9, 2013);

- The definition of “Indian tribe,” at 79 FR 33482 (June 11, 2014); and
- Disposition of unclaimed cultural items, at 80 FR 68465 (November 5, 2015).

The Department also publishes annual adjustments to civil penalties for inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

### **III. Development of the Proposed Rule**

As part of the Department’s regulatory review in accordance with the Regulatory Flexibility Act and E.O. 13563, the Department regularly seeks public input on how we may best achieve regulatory ends. Over the past 12 years, parties affected by the definitions and procedures established in 43 CFR part 10 have commented, in various forums, that some of the regulatory provisions should be amended to improve implementation of the Act.

The following paragraphs detail the degree of consultation, coordination, and collaboration in this review, and the nature of public comments that the Department received from lineal descendants, Indian Tribes, NHOs, Federal agencies, museums, national museum and scientific organizations, Indian Tribal historic preservation organizations, the Review Committee, and interested members of the public.

From March to July of 2011, the Department consulted with Indian Tribes, NHOs, the Review Committee, Federal agencies, and the public on full revisions to the regulations implementing the Act. This effort resulted from the Department’s publication of a final rule for the disposition of culturally unidentifiable human remains in March of 2010 (75 FR 12378) which solicited comments on the final rule. Many of those comments requested broader changes to the entire regulatory process. In April 2012 (77 FR 12378), the Department published a proposed rule to revise the regulations for accuracy and consistency based on some of those comments. Additional comments on

that proposed rule requested changes that went beyond the scope of accuracy and consistency.

Since 2012, the Department has heard repeatedly from Indian Tribes, NHOs, museums, and Federal agencies on the implementation of the Act through the regulations. From 2012 to 2019 at 21 meetings of the Review Committee, public commenters have highlighted concerns with the regulations or challenges in implementing its procedures. The Review Committee has heard frequently that the regulations themselves pose barriers to successful and expedient repatriation.

As a result of previous consultation, public comment, and input from the Review Committee, the Department developed a draft text of regulatory revisions and on July 8, 2021, provided Indian Tribes and NHOs with an invitation to consult on the draft text. Along with the draft text, the Department provided a summary of the 2011 consultation with Indian Tribes and NHOs and how the draft text was responsive to that input. The Department hosted consultation sessions with Indian Tribes on August 9, 13, and 16, 2021, and with NHOs on August 17, 2021. In addition, the Department accepted written input until September 30, 2021. In total, we received 71 individual comment letters, which when combined with oral comments from consultation sessions, yielded over 700 specific comments on sections of the draft text.

The Department reviewed each comment provided during consultation and in writing and, wherever possible, adjusted the proposed regulations to address them. In a separate document, the Department has provided a summary of each comment and specific detailed responses. An overview of the major comments received is provided here, and specific adjustments made to the proposed regulations in response to comments are noted throughout Part V. Section-by-Section Summary of Proposed Changes.

#### A. Cultural affiliation

We received a total of 179 comments on the definitions in the draft text of “cultural affiliation” and “geographical affiliation” and on the section for establishing cultural affiliation. Some of these comments requested an alternative process be developed utilizing the Secretary and the Review Committee to facilitate repatriation of human remains currently labeled as “culturally unidentifiable.” These same comments requested we strike most of the section on cultural affiliation, citing to the language in the Act (25 U.S.C. 3003(d)(2)(C) and 3005(a)(4)). Most comments focused on clarifying that one type of information was sufficient for finding cultural affiliation, especially geographic information. Some comments requested prioritizing the list of information or giving more weight to certain lines of information. Several comments suggested adopting language from the California statute on deference to traditional Native American knowledge as expert opinion. We received many supportive comments on the addition of multiple cultural affiliations and closest cultural affiliation.

In response, the Department proposes to define a new term, “affiliation,” in the proposed regulations and to combine the process for identifying cultural and geographical affiliation into a single section. The Department also proposes to define Native American traditional knowledge which is referred to throughout the proposed revision in identifying affiliation and cultural items and in conducting consultation. In response to several comments, the Department considered how an alternative process might work, considering the legal limitations on the Secretary and the Review Committee under the Act. The roles of the Secretary and the Review Committee are advisory only in this part of the repatriation process, and an alternative process limited by that role seems overly complicated and intrusive rather than helpful or expeditious.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part and D. Section 10.3 Cultural and Geographical affiliation.

## B. Consultation



We received a total of 115 comments on the term “consultation” and the related regulatory provisions. Nearly all comments appreciated the definition, but some comments suggested aligning it with definitions found in 36 CFR part 800, Executive Order 13175, or the U.N. Declaration on the Rights of Indigenous Peoples. Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process. Several comments questioned the requirement for Indian Tribes and NHOs to make written requests to consult.

In response, the Department proposes to define “consultation” to seek consensus and to require a record of consultation that explains, if applicable, why consensus or agreement could not be achieved. The requirement for a written request to consult (which can include email) is necessary to establish a required timeline for responding to a request.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part, Plan of Action in E. Section 10.4 General, and Require that Consultation Seek Consensus, in J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony and K. Section 10.10 Repatriation of human remains and associated funerary objects.

#### C. Discovery on Federal or Tribal lands

We received more than 100 comments on the draft text for discoveries on Federal or Tribal lands. Most of the comments were directed at two issues – 1) notification or consultation with Indian Tribes or NHOs when a discovery occurs, and 2) the timelines for action by the appropriate official after a discovery. The comments recommended that the requirements of the existing regulations at §10.4 be reinstated, specifically, immediate telephone notification and written confirmation by the person who makes the discovery.

Many comments expressed concern over the draft text paragraph on evaluating the potential for an excavation.

In response, the Department proposes to require written documentation (which can include email but not text messages) of a discovery within 24 hours. The Department proposes additional timelines in this section to ensure adequate time for consultation, a plan of action, and securing, protecting, monitoring, or, if required, excavation of the discovery.

See Part V. Section-by-Section Summary of Proposed Changes, F. Section 10.5 Discovery.

#### D. Comprehensive Agreements

We received 66 comments on the draft text on comprehensive agreements. The majority of comments requested plans of action be reinstated, and many comments remarked on the utility of a plan of action in responding to discoveries or excavations and promoting consultation and coordination between land managers and Indian Tribes. A few comments requested changes to provide for immediate reburial of human remains or cultural items without any procedural requirements that might delay a reburial. A few comments requested tribal preference be incorporated into both the plan of action and comprehensive agreements.

In response, the Department proposes to move the requirement for a plan of action in the existing regulations at §10.5 to the beginning of the subpart, and provide the requirements, in three separate steps, for a required plan of action before a planned activity, including an excavation, or after a discovery.

See Part V. Section-by-Section Summary of Proposed Changes, E. Section 10.4 General and references in F. Section 10.5 Discovery and G. Section 10.6 Excavation.

#### E. Control

We received a total of 68 comments on the term “control” as defined in the draft text. Many comments requested it be replaced with the statutory term “possession or control.” Other comments requested removing the use of “legal interest” from the definition, as the Act does not recognize a museum or Federal agency has a lawful interest in human remains or cultural items other than the “right of possession.” A few comments suggested museums and Federal agencies should be jointly and severally liable for compliance with NAGPRA’s inventory, summary, and repatriation obligations. The same comments requested the removal of the new term “custody.”

In response, the Department proposes to define the term as “possession or control” as used in the Act. Further, the Department has added clarifications to address how the Act did not intend for this term to confer any legal rights upon a Federal agency or museum, but instead act as an element of applicability of the Act’s repatriation provisions. The Department also proposes other regulatory revisions to require Federal agencies and museums to share information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items under loan or repository agreements to other entities.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part, and I. Section 10.8 General.

#### F. Funerary object

We received 64 comments on the definitions of “funerary object,” “associated funerary object,” and “unassociated funerary object.” Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition.

In response, the Department proposes to clarify long-standing confusion over the distinction between associated and unassociated funerary objects. For both associated and unassociated funerary objects, broad categorical identifications, including everything

from a burial site or specific area, may meet these definitions depending on the information available and the results of consultation.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part.

#### G. Stay of repatriation for a scientific study

We received 55 comments on the draft text carrying out the provision of the Act if human remains or cultural items are indispensable for completion of a specific scientific study the outcome of which would be of major benefit to the United States (25 U.S.C. 3005(b)). Half of the comments recommended the provisions should only apply to human remains and associated funerary objects, and not to unassociated funerary objects, sacred objects, and objects of cultural patrimony. Other comments suggested the provisions of the Act were intended to be limited to studies ongoing when the Act was passed in 1990. Other comments suggested clarifying changes.

In response, the Department has clarified some of the provisions, but has retained the provisions applying to both human remains and cultural items as in the Act (25 U.S.C. 3005(b)). The recommendation that this provision apply retroactively runs counter to the prospective applicability of the Act and would conflict with the Act.

See Part V. Section-by-Section Summary of Proposed Changes, J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony, and K. Section 10.10 Repatriation of human remains and associated funerary objects.

#### H. Summaries

We received 54 comments on the provision in the draft text requiring that museums and Federal agencies prepare and submit a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony in its holding or collection. Comments pointed out that the summary is prepared before consultation and that Indian

Tribes and NHOs are the best parties to determine whether any item in a holding or collection fits a NAGPRA category. Museums and Federal agencies could potentially use the draft text requirement to evade preparing a summary, claiming that they do not have such objects when they might.

In response, the Department proposes to retain language from the existing regulations in both the opening paragraph to the section and in the paragraph on completing a summary.

See Part V. Section-by-Section Summary of Proposed Changes, J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

#### I. Acknowledged and adjudicated aboriginal land

We received 51 comments on the new terms to replace “aboriginal land” and “aboriginal occupation.” Several comments appreciated the new definition of “acknowledged aboriginal land” and some comments recommended that “acknowledged aboriginal land” be used not just in Subpart C of the regulations, but also in Subpart B, either combined with the definition of “adjudicated aboriginal land,” or instead of that definition. Some comments suggested further clarifying language, including addition of other sources or changes to the listed sources. For “acknowledged aboriginal land,” many comments suggested changing the first source, “treaty sent by the President to the United States Senate for ratification,” to an earlier stage in the treaty-making process, while another comment suggested that it be deleted, since only a ratified treaty is final and authoritative.

In response, the Department proposes to add definitions of “adjudicated aboriginal land” and “acknowledged aboriginal land” to distinguish the criteria for a determination of “aboriginal land” under Subpart B and the Act (25 U.S.C. 3002(a)), on the one hand, and under Subpart C on the other. The Department proposes to include

intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes. In the Act, Congress defined “the aboriginal land of some Indian tribe” as “Federal land that is recognized by a final judgement of the Indian Claims Commission or the United States Court of Claims,” and we have used that to define “adjudicated aboriginal land.” The Department can neither add to this definition nor ignore it, so the comments requesting a change to the application or definition of adjudicated aboriginal land cannot be adopted.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part.

#### J. Federal lands and boarding schools

We received 39 comments on the definition for “Federal lands.” Several comments requested the addition of specific language to provide for protection and disposition of Native American children buried at Indian boarding schools, especially in circumstances where the land is not or was not owned or controlled by the U.S. Government, but the Indian boarding school was operated by or for the U.S. Government. Some comments asserted that the intentional excavation provisions of NAGPRA (25 U.S.C. 3002(c)) could be used to authorize the disinterment of Native children from these cemeteries on Federal or Tribal lands, and suggested that, for this purpose, the Department expand the statutory definition of “Federal lands” in the regulations to include any former Indian boarding school where any amount of Federal funding, government certifications, or permissions were granted, regardless of the current ownership of land.

In response, as discussed in the Secretarial Memorandum establishing the Federal Indian Boarding School Initiative, the Department is committed to “address[ing] the intergenerational impact of Indian Boarding Schools to shed light on the traumas of the past.” The Memorandum identifies the NAGPRA process as a possible method for

repatriation of some Native American children. While NAGPRA does not require a Federal agency to engage in an intentional excavation of possible burial sites, (*Geronimo v. Obama*, 725 F. Supp. 2d 182, 187, n. 4 (D.D.C. 2010)), we agree with the comments that the intentional excavation provisions of NAGPRA apply to the human remains and cultural items disinterred from cemeteries on Federal or Tribal lands. Congress did not make any distinction in the Act between excavations from cemeteries and excavations from other burial sites on Federal or Tribal lands. In fact, the definition of “burial site” in the Act (25 U.S.C. 3001(1)) explicitly refers to both a “natural or prepared physical location.” Furthermore, we agree with some comments that the excavation provisions of NAGPRA do not conflict with the opinion of the United States Court of Appeals for the Third Circuit in *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), where the Court ruled that the repatriation provisions of NAGPRA (25 U.S.C. 3005) did not apply to a proposed disinterment and repatriation of human remains. The human remains at issue in that case, while Native American, were not located on Federal or Tribal lands, so the excavation provisions were not at issue, and were therefore not addressed by the Court of Appeals. Thus, on Federal or Tribal lands, any excavation must comply with the Act, including the requirements for consultation with (or consent from) the appropriate Indian Tribe or NHO (25 U.S.C. 3002(c)) and the order of priority for disposition of human remains (25 U.S.C. 3002(a)).

Unfortunately, the Department cannot, however, amend the regulatory definition of “Federal lands” as the comments requested. Congress specifically and explicitly defined Federal lands based on ownership or control, not on receipt of Federal funds (as it did in the definition of a “museum”). Thus, “[w]e have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals .... In such case, neither [a] court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for

that of Congress.” *Alabama Power Co. v. United States EPA*, 40 F.3d 450,456 (D.C. Cir. 1994). See also, *United Keetoowah Band of Cherokee Indians of Okla. V. United States HUD*, 567 F.3d 1235, 1243 (10<sup>th</sup> Cir. 2009) (same); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”). The Department does, however, encourage the custodians of records from boarding schools, whether on Federal or Tribal lands or not, and the current owners of those boarding schools and cemeteries, to fully consult with Indian Tribes and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist Indian Tribes and NHOs in that process to the fullest extent of its authority.

Beginning in July 2021, the Department requested direct input from the Review Committee on the draft regulatory text prepared for consultation. The Review Committee held 14 meetings with over 50 hours of meeting time devoted to discussion of and development of written recommendations on the draft regulatory text. The Review Committee submitted a written recommendations to the Secretary of the Interior on March 14, 2022, and June 7, 2022. The Department reviewed these written recommendations, along with the minutes and transcripts from the related public meetings, in preparing the proposed regulations. The major comments received related to the Introductory section (see proposed 10.1) and the inventory update requirements in Subpart C – Repatriation of human remains or cultural items by museums or Federal agencies (see proposed 10.10(d) and (e)). Additional recommendations by individual members of the Review Committee were also submitted. The Department, wherever possible, adjusted the proposed regulations to address the Review Committee recommendations.

#### **IV. Overview of Major Proposed Changes**



The proposed revisions to these regulations would streamline requirements, clarify timelines and terms, reduce ambiguity, and improve efficiency in the systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony under the Act. The revisions being proposed today are intended to make the regulations more user-friendly and would:

- Reduce the number of sections and remove duplicative language. Existing requirements are condensed into a clear, easy to follow, step-by-step process.
- Correct inaccuracies and ambiguities in the existing regulations by using consistent language and clearly defined terms.
- Create a consistent writing style with clear, concise headings that describe each specific regulatory step.
- Clarify when actions are required by lineal descendants, Indian Tribes, Native Hawaiian organizations, museums, and Federal agencies by using specific timelines and deadlines.
- Provide clear instructions to Indian Tribes, NHOs, museums, and Federal agencies for establishing cultural and geographical affiliation and resolving competing claims or requests.

The proposed changes in Subpart B – Protection of Human Remains or Cultural Items on Federal or Tribal Lands would:

- Replace the requirement for Federal agencies to publish two notices in a newspaper of general circulation for human remains or cultural items removed from Federal lands with a requirement for Federal agencies to submit one notice to the Manager, National NAGPRA Program, for publication in the *Federal Register*.
- Require certain actions be taken by Indian Tribes, NHOs, and the State of Hawai'i Department of Hawaiian Home Lands (DHHL) for discoveries or excavations on

Tribal lands, including responding to a discovery, certifying that an activity may resume, authorizing an excavation, and documenting in writing the disposition of human remains or cultural items.

- Require Federal agencies and DHHL on Federal lands in the United States and Tribal lands in Hawai‘i to develop a plan of action or comprehensive agreement, in consultation with lineal descendants, Indian Tribes, and NHOs, that includes instructions for protecting, stabilizing, or covering human remains or cultural items in situ, if appropriate.
- Clarify that the jurisdiction of a Federal agency to issue a permit under Section 4 of the Archaeological Resources Protection Act (ARPA) for an excavation is no broader than it is under ARPA.

The proposed changes in Subpart C – Museum or Federal Agency Holdings or Collections would:

- Remove the term “culturally unidentifiable” (i.e., when cultural affiliation cannot be determined for human remains) and integrate the concept of repatriation through geographic origin into the overall affiliation and inventory process.
- Require repatriation of associated funerary objects together with human remains to an Indian Tribe or NHO with cultural or geographical affiliation.
- Require updated inventories for human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion. For the updated inventory, the proposed regulations would require a museum or Federal agency to initiate consultation, consult with requesting parties, and determine if there is a known lineal descendant or a connection between the human remains and associated funerary objects and Indian Tribes or NHOs with cultural or geographical affiliation.

- Require museums and Federal agencies to submit a notice of inventory completion within 6 months of completing or updating an inventory of human remains and associated funerary objects with a known lineal descendant or a connection to an Indian Tribe or NHO with cultural or geographical affiliation.
- Require museums and Federal agencies to send repatriation statements to the National NAGPRA Program. In the existing regulations, museums and Federal agencies are not required to report on any actions that occur after the publication of a notice. The proposed regulations would require both Federal agencies and museums to provide the Manager, National NAGPRA Program, with a copy of the written statement completing the repatriation, as recommended by the Government Accountability Office in a 2010 report on the implementation of the Act.
- Require museums to submit a statement describing holdings or collections in its custody to the responsible Federal agency, if known, and to the Manager, National NAGPRA Program. If a museum cannot identify a person, institution, state or local agency, or Federal agency that likely has possession or control of the holding or collection, it must submit a statement to the Manager, National NAGPRA Program. In the existing regulations, museums have no requirement to report on Federal holdings or collections. The proposed changes would align with the Department's response to the Government Accountability Office's 2010 report on the implementation of the Act.

## **V. Section-by-Section Summary of Proposed Changes**

Table 1 shows how the Department proposes to reorganize the existing regulatory requirements and summarizes the proposed changes.

**Table 1: Summary of proposed changes**

Existing 43 CFR section	Proposed 43 CFR section	Summary of proposed changes
10.1 10.15	10.1	<ul style="list-style-type: none"> <li>• Adds paragraphs on Accountability, Duty of care, Delivery of written documents, and Deadlines and timelines.</li> <li>• Informs parties of the result in failing to claim or request human remains or cultural items prior to disposition or repatriation.</li> <li>• Clarifies final agency action in a specific paragraph.</li> </ul>
10.2	10.2	<ul style="list-style-type: none"> <li>• Revises definitions for consistency and to reduce ambiguities.</li> <li>• Adds new terms to clarify requirements.</li> <li>• Removes obsolete terms.</li> </ul>
10.14	10.3	<ul style="list-style-type: none"> <li>• Implements Congressional intent by defining “affiliation” as a connection between human remains or cultural items and an Indian Tribe or NHO. Affiliation is established by identifying cultural or geographical affiliation.</li> <li>• Adds new paragraphs to assist when there are multiple Indian Tribes or NHOs with affiliation.</li> </ul>
10.2 10.3 10.4 10.5	10.4	<ul style="list-style-type: none"> <li>• Provides a general overview to the responsibilities of Indian Tribes, NHOs, Federal agencies, and DHHL under the Act.</li> <li>• Outlines the requirements in three steps for a plan of action, developed in consultation with Indian Tribes and NHOs.</li> <li>• Consolidates compliance options for land management activities that might result in a discovery or excavation of human remains or cultural items.</li> </ul>
10.4	10.5	<ul style="list-style-type: none"> <li>• Reduces and streamlines requirements for discoveries.</li> <li>• Provides a clear, documented process and timeline for resuming activities after a discovery.</li> </ul>
10.3 10.5	10.6	<ul style="list-style-type: none"> <li>• Removes duplicative language and simplifies the excavation requirements.</li> <li>• Clarifies and limits when a permit under Section 4 of ARPA is required.</li> </ul>
10.6 10.7	10.7	<ul style="list-style-type: none"> <li>• Adds process for disposition to a lineal descendant and clarifies requirements for disposition on Tribal lands.</li> <li>• Requires publication of notices in the <i>Federal Register</i> (rather than in newspapers) to improve the effectiveness of the notification and reduce burden on Indian Tribes and NHOs.</li> </ul>
N/A	10.8	<ul style="list-style-type: none"> <li>• Provides a general overview to the responsibilities of museums and Federal agencies for holdings and collections subject to the Act.</li> <li>• Requires museums to submit statements on holdings or collections in their custody but not in their possession or control one year after the effective date of the final rule.</li> </ul>

Existing 43 CFR section	Proposed 43 CFR section	Summary of proposed changes
10.8 10.9 10.10 10.11 10.13	10.9 10.10	<ul style="list-style-type: none"> <li>• Clarifies when and what actions are required for repatriation of human remains or cultural items in a simple step-by-step process.</li> <li>• Updates the deadlines for completing summaries and inventories to the effective date of the final rule.</li> <li>• Integrates the timelines into the step-by-step process for any new holdings or collections, newly recognized Indian Tribes, new museums, or amendments to previous decisions.</li> <li>• Establishes timelines, deadlines, and instructions for responding to requests for human remains or cultural items and completing repatriations.</li> </ul>
10.11	10.10	<ul style="list-style-type: none"> <li>• Requires updated inventories two years after the effective date of the final rule and notices of inventory completion six months after updating or completing an inventory.</li> <li>• Eliminates “culturally unidentifiable” when cultural affiliation cannot be determined.</li> <li>• Requires repatriation of associated funerary objects with human remains that have a cultural or geographical affiliation.</li> </ul>
10.12	10.11	<ul style="list-style-type: none"> <li>• Removes the limited definition of a failure to comply.</li> <li>• Replaces the dual hearing process with a single hearing process to contest the failure to comply or the penalty assessment.</li> </ul>
10.16 10.17	10.12	<ul style="list-style-type: none"> <li>• Consolidates and clarifies the responsibilities of and procedures for the Review Committee.</li> <li>• Clarifies requirements and the process for informal dispute resolution through informal negotiations and request before the Review Committee.</li> </ul>

#### A. Authority

NAGPRA, 25 U.S.C. 3001 *et seq.*, is the primary authority for the issuance of regulations implementing and interpreting the Act's provisions. The authority section continues to cite 25 U.S.C. 9 which authorizes the Secretary to make such regulations as he or she may think fit for carrying into effect the various provisions of any act relating to Indian affairs. Because the Act is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate any regulations needed to implement it under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F.2d 1354,

1360 (9th Cir. 1986)). Although 43 CFR part 10 previously cited one provision of the Archaeological Resources Protection Act (ARPA, 16 U.S.C. 470dd(2)) as an authority, the Department has determined that reliance on ARPA as authority for these regulations is unnecessary.

#### B. Section 10.1 Introduction

This section of the proposed rule would reorganize for readability and restate in plain language the purpose and general requirements found in the existing regulations. In response to consultation with Indian Tribes and NHOs, the Department proposes the purpose paragraph (see proposed §10.1(a)) recognize and ensure deference to the rights of lineal descendants, Indian Tribes, and NHOs, as provided under the Act. The Department is specifically seeking input during public comment on the proposed purpose paragraph.

In the applicability paragraph (see proposed §10.1(b)), the Department proposes a revision to clarify that these regulations pertain to Native American human remains or cultural items and require certain actions for their protection in the event of a discovery or excavation on Federal or Tribal lands after November 16, 1990, and for their repatriation if in the possession or control of a museum or Federal agency. The Act does not provide express authority for applying the discovery and excavation provisions to land that does not meet the definition of Federal or Tribal lands (25 U.S.C. 3002). However, depending on other relevant state or local laws, human remains or cultural items discovered or excavated from private or state lands may be subject to the repatriation provisions under Subpart C.

To further clarify the applicability of these regulations, the Department proposes to remove the existing paragraph §10.1(b)(2) to correct the misconception that human remains or cultural items must, themselves, be indigenous to Alaska, Hawai'i, and the continental United States. Under the Act, "indigenous" relates to the definition of "Native

American.” Human remains or cultural items are “Native American” based on a relationship to a tribe, people, or culture that is indigenous to the United States.

In response to consultation with Indian Tribes and NHOs, the Department proposes new regulatory provisions to address accountability by museums and Federal agencies and to require a duty of care for human remains and cultural items (see proposed §10.1(c) and (d), respectively). The paragraph on duty of care was drawn from language in the existing regulations at §10.7(2) and (3) which includes a requirement for Federal agencies to consider and respect the traditions of potential claimants (i.e., Indian Tribes and NHOs) including, but not limited to, traditions regarding housing, maintenance, and preservation, to the maximum extent feasible (emphasis added). During consultation, many Indian Tribes and NHOs requested that “to the maximum extent feasible” be incorporated into the duty of care requirement. The Department proposes to use the phrase “to the maximum extent possible” in the duty of care requirement for both museums and Federal agencies. In addition, this phrase is used to describe implementation of a plan of action under Subpart B and in the definition of consultation and the related regulatory steps in both Subpart B and C. The Department intends this phrase, “to the maximum extent possible,” to mean museums and Federal agencies will make a reasonable effort to:

- seek consensus during consultation,
- provide appropriate treatment, care, or handling of human remains or cultural items, and
- incorporate identifications, recommendations, and Native American traditional knowledge (see definition below) in making determinations.

Proposed §10.1(e) would: 1) consolidate and clarify those requirements governing the delivery of written documents that are currently dispersed throughout the existing regulations; and 2) provide for delivery of written documents by email with proof of

receipt, and explicitly exclude delivery of written documents by text message or social media message.

Proposed §10.1(f) would describe how deadlines and timelines for written documents are calculated based on business days, i.e., Monday through Friday, and that documents are deemed timely based on the sent date.

The Department also proposes to relocate to this Introduction section existing regulatory provisions regarding 1) failure to make a claim or a request (see proposed §10.1(g)), 2) judicial jurisdiction (see proposed §10.1(h)), and 3) final agency action (see proposed §10.1(i)). Regarding final agency action, “a final determination making the Act or this part inapplicable” is intended to be construed broadly across the regulatory process, including some circumstances where a Federal agency’s failure to comply with a regulatory requirement or deadline may demonstrate its determination that either the Act or this part is inapplicable. Regarding judicial jurisdiction (25 U.S.C. 3009(3)) nothing in the Act or these regulations is intended to abrogate any concurrent Tribal jurisdiction that may exist with respect to alleged violations of similar Tribal laws on Tribal lands.

Table 2 shows how the Department proposes to reorganize the existing regulatory requirements.

**Table 2: Cross-Reference of Existing Provisions to Proposed §10.1**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.1(a)	Purpose.	10.1(a)	Purpose.
10.1(b)	Applicability.	10.1(b)	Applicability.
	New	10.1(c)	Accountability.
10.7(b)	(2) Care for and manage...	10.1(d)	Duty of care.
	New	10.1(e)	Delivery of written documents.
		10.1(f)	Deadlines and timelines.



10.15(a)	Failure to claim prior to repatriation. (1) Any person who fails to make a timely claim...	10.1(g)	Failure to make a claim or a request.
10.11(e) 10.17(a)	Disputes. Formal and informal resolutions.	10.1(h)	Judicial jurisdiction.
10.15(c)	Exhaustion of remedies.	10.1(i)	Final agency action.
10.1(c)	The information collection requirements...	10.1(j)	Information collection.
10.15(a)	Failure to claim prior to repatriation. (2) If there is more than one (1) claimant...		Removed.
10.15(d)	Savings provisions.		Removed in part.

### C. Section 10.2 Definitions for this part

This section of the proposed rule defines terms used throughout this part. The Department proposes to reorganize defined terms in alphabetical order and remove the paragraph designations in the existing regulations at §10.2 in conformance with the *Federal Register* Document Drafting Handbook.

The Department does not propose any substantive changes to the following 10 definitions: Act, discovery (replaces “inadvertent discovery”), excavation (replaces “intentional excavation”), Federal agency, Manager, National NAGPRA Program, museum, person, Review Committee, Secretary, and summary. The Department proposes to remove the following seven definitions that are no longer used in the proposed regulations: burial site, cultural affiliation (see affiliation), culturally unidentifiable, Federal agency official, Indian Tribe official, museum official, and Native Hawaiian (see Native Hawaiian organization).

Table 3 shows how the Department proposes to add, replace, or revise terms for consistency, to reduce ambiguities, and to clarify requirements throughout this part. Except as noted in the table, all terms are explained in the immediate section below.

**Table 3: Changes to Existing Terms in Proposed §10.2**

<b>Change</b>	<b>Defined Term</b>
New terms	acknowledged aboriginal land adjudicated aboriginal land affiliation ahupua‘a appropriate official* ARPA* ARPA Indian lands* ARPA Public lands* consultation cultural item custody holding or collection Indian Tribe (previously reserved) Native American traditional knowledge ‘ohana right of possession Tribal lands of an NHO United States
Replace terms	“disposition” and “repatriation” replace “disposition” “possession or control” replaces “possession” and “control”
Revise existing terms	Federal lands funerary object human remains inventory lineal descendant Native American Native Hawaiian organization object of cultural patrimony receives Federal funds sacred object traditional religious leader Tribal lands unclaimed cultural item

\* See proposed §10.4 and §10.6 and related preamble section

1. “Acknowledged aboriginal land” and “adjudicated aboriginal land”

The Department proposes to add two new terms to replace “aboriginal lands” and “aboriginal occupation,” which are not defined but are used in the existing regulations §§10.6 and 10.11. The new terms, “acknowledged aboriginal land” and “adjudicated aboriginal land,” would contain the same requirements for “aboriginal lands” and “aboriginal occupation,” found in the existing regulations at §§10.6(a)(2)(iii)(A) and

10.11(b)(2)(ii) and (c)(1)(ii), but the new definitions would distinguish and clarify how to apply the terms.

For “acknowledged aboriginal land,” the definition would elaborate on which treaties may be used to identify aboriginal land and would add other Federal, foreign, or intertribal government documents to the list of acceptable sources. Some examples of other Federal documents that provide information on aboriginal occupation by an Indian Tribe are “Report to the President by the Indian Peace Commission, 1868,” “Annual Reports of the Commissioner on Indian Affairs,” and “Alaska Natives and the Land” (by the Federal Field Committee for Development Planning in Alaska, October 1968). A source for identifying intertribal treaties, diplomatic agreements, and bilateral accords is David H. DeJong’s book “American Indian Treaties,” which identifies 63 intertribal treaties, dating between 1666 and 1903. The Department has intentionally declined to require that intertribal treaties, diplomatic agreements, or bilateral accords be in writing in recognition of traditional forms of documentation, such as two-row wampum belts.

For “adjudicated aboriginal land,” the definition is drawn from the Act (25 U.S.C. 3002(a)(2)(C)) and clarified, based on Sections 15 and 22 of the Indian Claims Commission Act of 1946 (Pub. L. No. 79-726, 60 Stat. 1049), that a final judgment also includes a judgment concerning a settlement (compromise of claim) if that judgment or settlement either explicitly recognizes certain land as the aboriginal land of an Indian Tribe or adopts findings of fact that do so.

## 2. “Affiliation”

The Department proposes a new term, “affiliation,” and to remove the existing definitions of “cultural affiliation” and “culturally unidentifiable.” This change reflects Congressional intent and focus on affiliation for the sole purpose of disposition or repatriation. In defining affiliation, Congress “intended to ensure that the claimant has a reasonable connection with the materials” (H.Rep. 101-877, at 14, and S.Rep. 101-473, at

6). Identifying “cultural affiliation” has been a significant barrier to disposition and repatriation under the Act, despite the clear intent of Congress that it be used for no other purpose than to ensure a reasonable connection between the human remains and cultural items and an Indian Tribe or NHO. Defining “affiliation” in these regulations without the qualifier of “cultural” better aligns with Congressional intent, and addresses concerns raised during consultation with Indian Tribes and NHOs about implementing the term “geographical affiliation” separately from cultural affiliation. In response to consultation with Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this definition and the section on affiliation. The definition of “cultural affiliation” from the Act and the existing regulations, the lines of information, and the use of geographic relationships consistent with the existing regulation are all incorporated into the regulatory process by which “affiliation” is established in the proposed text at §10.3.

### 3. “Ahupua‘a”

The Department proposes to add a new term, “ahupua‘a,” to use when determining the Native Hawaiian organization with the closest affiliation to human remains or cultural items. While the term serves a geographic purpose, identifying a traditional land division, an ahupua‘a may also be associated with various traditional and customary practices in addition to habitation and provides important cultural connections between its earlier occupants or traditional users and Native Hawaiian organizations. Traditionally, the occupants of an ahupua‘a are its primary stewards.

### 4. “Consultation”

The Department proposes to add a new term, “consultation,” using language provided by Congress (H. Rep. 101-877, at 16). In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus and incorporate identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.

## 5. “Cultural item”

In response to consultation with Indian Tribes and NHOs, the Department proposes to add a new term, “cultural item,” and specifically exclude human remains from that definition. Although Congress included human remains in defining cultural items (25 U.S.C. 3001(3)), the Department proposes throughout these regulations to use the phrase “human remains or cultural items” rather than “cultural items.” This edit is responsive to requests from some Indian Tribes and NHOs who oppose any language that identifies people as items since this can be seen as objectifying and dehumanizing. This edit does not have any impact on the applicability or scope of these regulations.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition of cultural items (and to subsequent specific definitions of cultural items) that identification of cultural items is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of cultural items is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of cultural items, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a cultural item.

The Act was enacted for the benefit of Indians, therefore the canons of construction for Indian law applies. The Act and these regulations “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). Consistent with this principle, the Department proposes to require deference to lineal descendants, Indian Tribes, and NHOs throughout the regulations, but specifically for identification of cultural items. Legislative intent on the definition of cultural item, generally, and to each definition specifically, is clear. “The Committee has

made every effort to incorporate the comments and address the concerns of members of the scientific and museum communities with regard to the substantive definitions set forth in the Act, while at the same time recognizing that there are over 200 tribes and 200 Alaska Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community. Accordingly, the definitions of sacred objects, funerary objects, and items of cultural patrimony will vary according to the tribe, village, or Native Hawaiian community.” (Senate Rpt. 101-473, page 4).

#### 6. “Custody”

The Department proposes to add a new term, “custody,” that would indicate an obligation for human remains or cultural items that is less than “possession or control.” See discussion of “possession or control” below. This newly defined term does not have the same meaning as the general meaning given to the same word used throughout the existing regulations, especially at §10.6.

#### 7. “Disposition”

The Department proposes to replace the term “disposition” in the existing regulations at §10.2(g)(5) with two separate terms: “disposition” and “repatriation.” In the proposed revision, “disposition” applies only to Subpart B. The proposed revision to “disposition” would denote that an Indian Tribe, NHO, Federal agency, or DHHL acknowledges and recognizes that a lineal descendant, Indian Tribe, or NHO has control or ownership of human remains or cultural items removed from Federal or Tribal lands. Although the phrase, control or ownership, is not defined in the Act or the proposed regulations, it is used to refer to the rights of lineal descendants, Indian Tribes, and NHOs in Native American human remains or cultural items as acknowledged and recognized by the Act. The phrase, control or ownership, is used to differentiate “disposition” and “repatriation” from terms used in other sections of the Act, such as the “right of

possession,” which a museum or Federal agency may use to assert its lawful control or ownership, or “possession or control,” which is an element of applicability under the Act that itself does not determine control or ownership or a right of possession. In describing disposition, the Act uses the terms “ownership,” “control,” “right of control,” and “title to” (25 U.S.C. 3002). Of these terms, the phrase, control or ownership, is the most appropriate to apply to human remains as well as cultural items that may be subject to disposition and describes the existing rights of lineal descendants, Indian Tribes, and NHOs more accurately. The phrase, control or ownership, is intended to indicate that, as in the Act, human remains or cultural items removed from Federal or Tribal lands belong, in the first instance, to lineal descendants, Indian Tribes, and NHOs and not to the Federal agency.

#### 8. “Federal land”

The Department proposes to revise the term “Federal land” to clarify the lands on which Federal programs or activities may be subject to the Act. As in the existing regulations, “Federal land” includes lands not just owned by the United States Government, but also lands under its control. (Note that the general term “control” as used in this discussion of Federal land is not the same as the defined term “possession or control” as used in the Act). Whether Federal control of the lands on which it conducts its programs or activities is sufficient to apply these regulations depends on the circumstances and scope of the Federal agency’s authority, and on the nature of State and local jurisdiction. Because of the wide array of agency-specific authorities that can establish federally controlled lands, the Federal agency officials must make such determinations on a case-by-case basis and, in doing so, should consult with their legal counsel.

While Federal agency officials must ultimately make their own determinations as to the lands under the control of their agency, the drafters note that, in general, a Federal

agency will only have sufficient legal interest to “control” lands it does not own when it has sufficient statutory jurisdiction with respect to those lands or other form of property interest in the land, such as a lease, easement, or other agreement with terms that have indicia of control. *See Yankton Sioux Tribe v United States Army Corps of Eng'rs*, 396 F. Supp 2d 1087 (D.S.D. 2005); *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 (D.C. Cir. 2003) (the Act still applied to lands transferred by the U.S. Army Corps of Engineers to South Dakota pursuant to the Water Resources Development Act due to a specific statutory provision applicable to those transferred lands). Where two or more Federal agencies share regulatory or management jurisdiction over federally owned or controlled lands, the Federal agency with primary management authority will generally have “control” for purposes of implementing these regulations.

On the other hand, the drafters note that Federal agency participation in a regulatory or supervisory capacity does not necessarily rise to the level of Federal “control.” *See, e.g., Castro Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001) (claims for violations of the Act with regard to human remains found on municipal land could not be upheld, even though a Federal agency was involved in the project in a supervisory role); *Western Mohegan Tribe and Nation of New York v. New York*, 100 F. Supp. 2d 122, (N.D.N.Y. 2000), *aff'd in part, vacated in part on other grounds* 246 F.3d 230 (2nd Cir. 2001) (“Plaintiffs' broad reading of the statute is inconsistent with the Act’s plain meaning and its legislative history where the language 'Federal lands' denotes a level of dominion commonly associated with ownership, not funding pursuant to statutory obligations or regulatory permits.”). For example, the fact that a Federal permit is required to undertake an activity on non-Federal land generally is not sufficient legal interest in and of itself to “control” the land within the meaning of the Act and this proposed rule.



Indian lands outside reservation boundaries that are held in trust by the United States Government or are held by an Indian landowner subject to restrictions on alienation imposed by the United States Government, such as allotments, are subject to Federal control and are treated as Federal lands under these regulations. The control of the United States Government over Indian land is the same whether it is in trust or restricted status and whether it is within the exterior boundaries of a reservation or not. *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926). See also *Cohen's Handbook of Federal Indian Law* §16.03[1], at 1071 (Nell Jessup Newton ed., 2012). Since Congress's control is virtually the same for trust allotments and off-reservation allotted lands with Federal restraints on encumbrance and alienation (restricted fee allotments), then Federal control of such lands as a matter of law meets the *Western Mohegan* standard noted above. The treatment of off-reservation Indian land as "Federal land" for purposes of the Act is consistent with the current practice of the Bureau of Indian Affairs.

#### 9. "Funerary object"

The Department proposes to revise the term "funerary object" and align it with the definitions in the Act for "associated funerary object" and "unassociated funerary object." The portion of the statutory definition that is the same between the two terms has been used to define "funerary object." As defined in the Act, the only difference between the definition for associated and unassociated funerary objects is the location of the related human remains. A single object may be a funerary object if the object is identified as having been placed with or near human remains. Therefore, determining if the funerary object is associated or unassociated does not require identifying the specific individual with which the object was placed, but rather, only requires identifying the location of the related human remains.

For example, an authorized excavation in 1940 removed a Native American object from what was thought to be a village site dating between 2000 BCE to 500 CE.

The object dates to the late pre-contact period, likely between 1500-1580 CE, based on materials and form. Fragmentary human remains were identified during the excavation and noted in field notes, but no human remains were removed. Based on information available including the results of consultation, it is reasonable to believe the object was placed intentionally in this location because of the human remains, but it is also reasonable to believe the object was placed there many centuries after the human remains. Nevertheless, the object meets the definition of a funerary object since it was intentionally placed near human remains.

The funerary object does not, however, meet the definition of an associated funerary object. Human remains were identified, but no human remains were removed during the excavation. In the information available, there is no record of human remains being removed from the site at any other time. Through consultation with Indian Tribes, the funerary object was not identified as being the kind of object made exclusively for burial purposes or to contain human remains.

When a funerary object is not an associated funerary object, it may be an unassociated funerary object if it meets one or more of the criteria in the definition (see proposed §10.2 Funerary object (2)). The funerary object is not related to specific individuals or families (see proposed §10.2 Funerary object (2)(ii)). The funerary object was not removed from a specific burial site or an area known to be a burial site (see proposed §10.2 Funerary object (2)(iii) and (iv)). However, the funerary object is related to known human remains (identified in the field notes), but those human remains were not removed from the site (see proposed §10.2 Funerary object (2)(i)). Therefore, the funerary object meets the definition of an unassociated funerary object.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition of funerary object (and to all specific definitions of cultural items) that identification of a funerary object is according to a lineal descendant,

Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of a funerary object is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of a funerary object, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a funerary object.

#### 10. “Holding or collection”

The Department proposes to add a new term “holding or collection” which is not defined in the Act. The proposed definition is drawn from dictionary definitions as well as the International Council of Museums’ 2007 definition. Merriam-Webster Dictionary defines “collection” as “something collected; especially: an accumulation of objects gathered for study, comparison, or exhibition...” and defines “holding” as “any property that is owned or possessed...” The International Council of Museums’ 2007 definition of a museum is an institution “which acquires, conserves, researches, communicates and exhibits...for the purposes of education, study, and enjoyment.” Additional purposes in this definition are taken from Unit 34 of “Museum Basics” (1993) by Timothy Ambrose, which lists different types of museum collections. In response to consultation with Indian Tribes and NHOs, we have refrained from using offensive purposes listed in some of these sources such as “enjoyment” or “personal benefit.” While the proposed definition includes a wide variety of purposes, a holding or collection under this proposed rule would not be limited to only these purposes.

#### 11. “Human Remains”

The Department proposes to revise the term “human remains” to clarify what is and what is not considered human remains for purposes of disposition and repatriation. The proposed revision is based on the explanation provided in the preamble to the 1995 final rule (60 FR 62137, December 4, 1995). The explanation noted that the Act makes

no distinction between fully articulated burials and isolated bones and teeth. The preamble then stated that the final rule added language excluding “naturally shed” human remains from consideration under the Act. The preamble clarified that this exclusion does not include human remains for which there is evidence of purposeful disposal or deposition. The preamble then addressed a question asked by a commenter who sought clarification on the status of human remains that were not freely given but had been incorporated into objects that are not cultural items as defined in the regulations. The preamble explained that the legislative history does not address this question and therefore the proper disposition of such human remains must be determined on a case-by-case basis.

Consistent with the advice in 1995, identification of human remains must be made on a case-by-case basis. The Act requires identification of all human remains in a holding or collection, including human remains reasonably believed to be comingled with other material (such as soil or faunal remains). During consultation with lineal descendants, Indian Tribes, and NHOs, museums and Federal agencies should evaluate if an entire admixture can be treated as human remains. If such a request is made during consultation, but it is not possible to treat the admixture as human remains, the record of consultation should include the effort to identify a mutually agreeable alternative. The proposed definition provides two ways human remains may be incorporated into an object or item. For example, depending on the results of consultation, a scalp shirt with human remains or a flute made with human remains that is not a funerary object, a sacred object, or an object of cultural patrimony would be considered human remains and subject to disposition or repatriation under the Act and the proposed regulations. Human remains that are incorporated into a funerary object, sacred object, or object of cultural patrimony would not be treated as human remains, but as a cultural item and subject to disposition or repatriation under the Act and the proposed regulations.

## 12. “Indian Tribe”

The Department proposes to add a definition for the term “Indian Tribe,” currently reserved in the existing regulations at §10.2(b)(2). The list of federally recognized Indian Tribes is the list of Indian Tribes for the purposes of NAGPRA. Throughout the proposed rule, the term is used in the singular form, but it is expected that multiple Indian Tribes may meet the criteria under this part for disposition or repatriation of the same human remains or cultural items. Any Indian Tribe with cultural or geographical affiliation may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

## 13. “Inventory”

The Department proposes to revise the term “inventory” to accurately reflect the content as required by the Act. In response to consultation with Indian Tribes and NHOs, the Department is aware that the existing regulatory definition has been a barrier to expeditious repatriation as it requires an “item-by-item description.” In the Act, an inventory is defined as a “simple itemized list.” The proposed revision to the definition uses the exact language from the Act and includes the information required to be included in an inventory.

## 14. “Lineal Descendant”

The Department proposes to revise the definition and remove the criteria for determining lineal descent in the existing regulations at §§10.2(b)(2) and 10.14(b). The term “lineal descendant” is not defined in the Act. The revised definition would allow for disposition or repatriation of human remains and associated funerary objects to a “lineal descendant” in the following cases:

- The identity of a particular deceased individual is known, and a specific living person is known to be the direct descendant of the deceased individual. For example, the human remains are of the great-great-grandfather of the living great-great-granddaughter.
- The identity of each deceased individual in a group of human remains is not known, but a specific living person is known to be the direct descendant of all the deceased individuals in the group. For example, all that is known is that the human remains of multiple individuals are the great-great-grandfather, great-grandfather, father, and maternal uncle of a specific living person, who is the direct descendant of them all under a traditional system of descent.

Throughout the proposed rule, the term is used in the singular form, but it is expected that multiple lineal descendants may meet the criteria under this part for disposition or repatriation of the same human remains, funerary objects, or sacred objects. Any lineal descendant may submit a claim for disposition or a request for repatriation for human remains, funerary objects, or sacred objects. Two or more lineal descendants may agree to joint disposition or joint repatriation of human remains, funerary objects, or sacred objects. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

#### 15. “Museum”

The Department proposes a slight addition to the term “museum” to clarify that, consistent with the Act, the term does not include the Smithsonian Institution. Also consistent with the Act, the term “museum” includes State or local government agencies, including subdivisions of State or local government agencies. Consequently, any of the following examples may be a museum under the Act and the proposed regulations if they

meet all the criteria of the definition: a county coroner's office, a city medical examiner's office, a State police department or local post, a city library, or a city water authority.

16. "Native American"

The Department proposes to revise and clarify the existing definition of "Native American." The Act applies to human remains or cultural items that meet the definition of "Native American." "Native American" human remains or cultural items are not only items of a tribe, people, or culture that is indigenous to the United States, but are also items that are related to such tribe, people, or culture. Because Congress did not define "tribe," "people," or "culture," the proposed definition of the term "Native American" incorporates statutory and dictionary definitions to better clarify these terms.

17. "Native American traditional knowledge"

The Department proposes to add a new term, "Native American traditional knowledge," for use in the definition of "consultation" and "cultural item" as well as definitions of specific kinds of cultural items. In response to consultation with Indian Tribes and NHOs, this definition is a variation on what was suggested by a specific Indian Tribe, but this term is rooted in the larger concept of indigenous ways of knowing. The proposed definition attempts to cover the wide variety of terminology related to this concept while remaining consistent with the disposition and repatriation process under the Act. The Department recognizes that there is different terminology used by and among Native American people that incorporates this concept. Additionally, the concept of traditional knowledge is recognized by a number of Federal agencies in the context of land management activities and the use of natural or cultural resources. In these contexts, it is often referred to as traditional ecological knowledge or TEK. It may also be referred to as indigenous knowledge or traditional cultural knowledge. For the limited purposes of these regulations, the term "Native American traditional knowledge" is inclusive of all these terms and may provide information needed to identify affiliation (either cultural or

geographical), funerary objects, lineal descendants, objects of cultural patrimony, and sacred objects. We welcome additional input on the specifics in this definition as well as its use in the regulatory text.

18. “Native Hawaiian organization”

The Department proposes to revise the term “Native Hawaiian organization” (NHO) by incorporating the definition of “Native Hawaiian” from the Act. While the Act uses the phrase “aboriginal people” to define Native Hawaiian, the proposed regulations use the phrase “indigenous people” to better relate to the definition of Native American and distinguish from the use of aboriginal elsewhere in the Act and regulations referring to land. The proposed definition would include those entities that the Secretary, through the Office of Native Hawaiian Relations, has identified on the most current Native Hawaiian Organization Notification List. The Department also proposes to include in the definition of NHO the Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations. Although the Act names Hui Malama I Na Kupuna O Hawai‘i Nei as a Native Hawaiian organization, that group ceased to exist in 2015, so the proposed definition does not include it.

Throughout the proposed rule, “Native Hawaiian organization” is used in the singular form, but it is expected that multiple NHOs may meet the criteria under this part for disposition or repatriation of the same human remains or cultural items. Any NHO with affiliation may submit a claim for disposition or a request for repatriation under the proposed rule. Two or more NHOs may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation would be considered a single request and not competing claims or requests.

19. “Object of cultural patrimony”

The Department proposes to revise the definition of “object of cultural patrimony” to clarify what a Native American group or culture is for purposes of the



definition. In response to consultation with Indian Tribes and NHOs and a specific suggestion from an Indian Tribe, the Department also proposes to add a sentence to recognize that a caretaker may have been entrusted with responsibility for an object and may have even conferred that responsibility on another caretaker, but the object can still be an object of cultural patrimony. In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition (and to all specific definitions of cultural items) that identification of an object of cultural patrimony is according to an Indian Tribe or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of an object of cultural patrimony is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of an object of cultural patrimony, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how an Indian Tribe or NHO shares the information needed to identify an object of cultural patrimony.

20. “‘ohana”

To emphasize the importance of the familial or kinship relationship in Hawai‘i, the Department proposes to add a new term “‘ohana,” used in the definition of “Native Hawaiian organization” and in determining the NHO with the closest affiliation.

21. “Possession or control”

In response to consultation with Indian Tribes and NHOs, the Department proposes to replace the two separate terms in the existing regulations “possession” and “control” into one term, as used in the Act, “possession or control.” Congress used these two words as a single term throughout the Act except for “right of possession” (discussed later). The phrase “possession or control” as used in the Act connotes a singular interest in human remains or cultural items and utilizes the two elements of the phrase only to address the physical location of the human remains or cultural items. In the Act, having

possession or control means a museum or Federal agency may make decisions about human remains or cultural items without having to request permission from some other entity or person (an interest). This interest is present regardless of the physical location of the human remains or cultural items. For a similar example, a person has the same interest in property that is in the person's home as in property that same person keeps in an offsite storage unit. The person can make decisions about the property in the storage unit without having to request permission from the storage facility. Regardless of the physical location of the property, the person's interest in the property is the same whether it is in their home or in the custody of the storage facility.

The Department also proposes to define a separate term, "custody," that would indicate an obligation that is less than "possession or control." Whether a Federal agency or museum has a sufficient interest in human remains or cultural items to establish possession or control is a legal determination that must be made on a case-by-case basis. However, when a museum with custody of human remains or cultural items cannot identify any person, institution, State or local government agency, or Federal agency with possession or control, the museum should presume it has possession or control for purposes of repatriation under the Act. When a Federal agency cannot determine if human remains or cultural items came into its possession or control before or after November 16, 1990, or cannot identify the type of land the human remains or cultural items were removed from, the Federal agency should presume it has possession or control for purposes of repatriation under the Act. This determination alone does not create any legal rights or indicate that a museum or Federal agency has a "right of possession" to human remains or cultural items; it is merely a jurisdictional requirement for application of the Act to human remains or cultural items subject to repatriation by the appropriate museum or Federal agency.

The Department received several comments through consultation with Indian Tribes and NHOs requesting that it expand the scope of the term “possession or control” to include both those entities that have possession or control as defined in the existing regulations and those entities that merely have custody as defined in this proposed rule. In some cases, this request would make multiple entities concurrently responsible for fulfilling the Act’s inventory, summary, and repatriation processes. The Department has declined to make this change as such an interpretation is inconsistent with the framework and legislative history of the Act. Congress provided no indication in the Act or its legislative history that such an expansive interpretation was its intent, and various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency would be responsible for compliance with the Act. However, the Department acknowledges the underlying intent of this request to ensure repatriation of all holdings or collections subject to the Act and has proposed other revisions that seek to address this issue by directing museums and Federal agencies to share greater information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items in the custody of other entities.

## 22. “Receives Federal funds”

The Department proposes to revise the term “receives Federal funds” to clarify that any recipient of Federal financial assistance would be deemed to receive Federal funds under this part. The definition is drawn from the interpretation of comparable terms from the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, as amended, implementing regulations, and OMB’s Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200). The “Receives Federal funds” requirement may be satisfied by direct or indirect receipt of funds from the Federal government. Satisfaction of the requirement through indirect funding is permissible and

consistent with the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1982).

For example, an educational institution that accepts no direct Federal financial assistance is deemed to receive Federal financial assistance when it enrolls students who receive Federal grants that must be used for educational purposes (34 CFR part 106). A Tribal museum receives Federal funds for purposes of repatriation if the Indian Tribe of which the museum is a part receives Federal financial assistance. A county library receives Federal funds for purposes of repatriation if its State government or other agency provides a subaward to the library as part of a Federal grant or award. The term also underscores that the U.S. Government's payments that are compensatory, such as payments in lieu of taxes paid under the Payments in Lieu of Taxes Act, as amended (31 U.S.C. 6901 *et seq.*) are not considered Federal financial assistance (and *see McMullen v. Wakulla County Board of County Commissioners*, 650 Fed. Appx. 703 (11th Cir. 2016)).

### 23. "Repatriation"

The Department proposes to replace the term "disposition" in the existing regulations at §10.2(g)(5) with two separate terms: "disposition" and "repatriation" used consistently throughout the regulations. In the proposed revision, "repatriation" applies only to Subpart C and has been incorporated into the title of that subpart. The proposed revision would denote that a museum or Federal agency acknowledges and recognizes that a lineal descendant, Indian Tribe, or NHO has control or ownership of human remains or cultural items in a holding or collection. Although the phrase, control or ownership, is not defined in the Act or the regulations, it is used to refer to the rights of lineal descendants, Indian Tribes, and NHOs in Native American human remains or cultural items acknowledged and recognize by the Act. The phrase, control or ownership, is used to differentiate "disposition" and "repatriation" from terms used in other sections of the Act, such as the "right of possession," which a museum or Federal agency may use

to assert its lawful control or ownership, or “possession or control,” which is an element of applicability under the Act that itself does not determine control or ownership or a right of possession. In describing repatriation, the Act uses the terms “return,” “owned,” and “owned or controlled” (25 U.S.C. 3005). Of these terms, the phrase, control or ownership, is the most appropriate to apply to human remains as well as cultural items that may be subject to repatriation and describes the existing rights of lineal descendants, Indian Tribes, and NHOs more accurately. The phrase, control or ownership, is intended to indicate that, as in the Act, human remains and cultural items in holdings or collections belong, in the first instance, to lineal descendants, Indian Tribes, and NHOs and not to the museum or Federal agency unless the museum or Federal agency is able to prove a “right of possession.” By using “right of possession” as a standard of repatriation, the Act establishes that museums and Federal agencies do not have a rightful legal interest in human remains or cultural items unless the museum or Federal agency can prove an authoritative transfer of that “right of possession.”

#### 24. “Right of possession”

The Department proposes a new defined term “right of possession” by moving the text from the existing regulations at §10.10(a)(2). The Act recognizes a “right of possession” to cultural items; however, Congress acknowledged that this right is qualified with respect to human remains and associated funerary objects. The Act utilizes the concept of right of possession first as a defense against criminal sanctions for the sale, purchase, use, or transport for profit of human remains (18 U.S.C. 1170); and again, where museums and Federal agencies are permitted to assert a right of possession to unassociated funerary objects, sacred objects, and objects of cultural patrimony with evidence (25 U.S.C. 3005).

Congress did not provide a process for a museum or Federal agency to assert a right of possession to human remains and associated funerary objects. This approach is

consistent with Congress' intent to distinguish human remains and associated funerary objects from cultural items as quasi-property. Applicable common law in the United States generally accepts that human remains and associated burial items cannot be "owned" in the same manner as conventional property. The Act (25 U.S.C. 3001 (13)) follows the common law by distinguishing between the property attributes of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony, and the quasi-property attributes of Native American human remains and associated funerary objects.

Congress acknowledged that the right of possession to unassociated funerary objects, sacred objects, or object of cultural patrimony, as defined in the Act, may be subject to a Fifth Amendment takings analysis, and that these objects may potentially be considered property. A right of possession for prehistoric cultural items fitting these categories might be shown through a written authorization from a competent authority to excavate, remove, and curate such items from a particular area or site. Although Congress also determined that the original acquisition of Native American human remains and associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate Indian Tribe or NHO is deemed to give right of possession to those human remains and associated funerary objects, Congress chose not to make that right of possession to human remains and associated funerary objects subject to a Fifth amendment takings analysis. Congress was clear that it did not intend to categorize human remains and associated funerary objects as property under the Act, as had been its approach for unassociated funerary objects, sacred objects, or object of cultural patrimony. Thus, a Fifth Amendment taking does not result from the repatriation of human remains and associated funerary objects.

In the proposed revision, the Department interprets “voluntary consent” and “full knowledge and consent” considering the history of Indian country and recognizes that “voluntary consent” and “full knowledge and consent” does not include “consent” given under duress or as a result of bribery, blackmail, fraud, misrepresentation, or duplicity on the part of the recipient. As such, consent in this definition must be shown to have been fully free, prior, and informed consent.

25. “Sacred object”

In response to consultation with Indian Tribes and NHOs, the Department proposes to revise that a sacred object is, in the words of the Act, “needed” for a traditional Native American religious practice. Such practice could include the need to ritually inter the object. The Department proposes to add to the definition of sacred object (and to all specific definitions of cultural items) that identification of a sacred object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of a sacred object is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of a sacred object, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a sacred object.

26. “Traditional religious leader”

The Department proposes to revise the term “traditional religious leader” in response to consultation with Indian Tribes and NHOs. The term is not defined in the Act and the proposed revisions are intended to clarify and simplify the definition. The proposed revisions intend to place the authority for identifying a traditional religious leader in the hands of an Indian Tribe or NHO. There is no requirement for an Indian Tribe or NHO to disclose information about the cultural, ceremonial, or religious

practices or cultural duties or leadership role used to identify a traditional religious leader.

27. “Tribal lands”

The Department proposes to revise the term “Tribal lands” by removing the provision in the existing regulations related to a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution (25 U.S.C. 3001(13)). Comments to the 1995 final rule sought clarification regarding the application of NAGPRA to privately owned lands within the exterior boundaries of an Indian reservation. To address any potential conflict, the final rule codified language stating that the regulations will not apply to Tribal lands to the extent that any particular action authorized or required will result in such a taking of property. A review of the legislative history for the Act shows this concept does not apply to the statute as enacted and therefore is removed from the definition of Tribal lands.

28. “Tribal lands of an NHO”

The Department proposes to add a new term “Tribal lands of an NHO” to more accurately describe a subset of Tribal lands in Hawai‘i so it can be applied in the regulatory process in Subpart B. In the Act, priority for disposition of human remains or cultural items from Tribal lands is in the Indian Tribe or NHO on whose Tribal lands the human remains or cultural items were removed. While the Tribal lands of an Indian Tribe is clearly identified by the definition of Tribal lands, the application of this priority on Tribal lands in Hawai‘i is not clear from the definition of Tribal lands alone. This definition provides for an NHO to take on responsibility for the provisions of the Act from the State of Hawai‘i DHHL. When an NHO has a lease or license from DHHL pursuant to the Hawaiian Homes Commission Act (HHCA), that NHO can elect to take on any of the responsibilities under Subpart B of the proposed regulations on its Tribal lands (see proposed §§10.5(c), 10.6(a), and 10.7(c)).



29. “Unclaimed cultural items”

The Department proposes to revise the term “unclaimed cultural items” for clarity. The proposed revision retains the same central requirement of the existing definition but removes the more regulatory process part of the existing regulation to the regulatory text (see proposed §10.7(e)).

30. “United States”

The Department proposes to add a new term “United States” to provide a geographical descriptor throughout this part.

D. Section 10.3 Cultural and Geographical Affiliation

This section of the proposed rule would improve the organizational structure of the existing regulations and better align the requirements with Congressional intent. The Department proposes to relocate existing regulatory provisions at §10.14 to Subpart A-General.

The proposed revisions would remove the criteria for determining lineal descent in the existing regulations at §10.14(b), as it is repetitive of the definition for lineal descendant and not necessary. In conjunction with the defined term “affiliation,” the proposed revisions reflect the intent of Congress that for purposes of disposition or repatriation, all that is required is a reasonable connection between human remains or cultural items and an Indian Tribe or NHO (H.Rep. 101-877, at 14, and S.Rep. 101-473, at 6). The proposed revisions identify two kinds of affiliation for purposes of disposition or repatriation: cultural or geographical.

1. Cultural affiliation.

For cultural affiliation, the proposed revisions clarify the existing requirements by moving “cultural affiliation” to this section to include not only what it is, but also how it is established and what it does not require. The proposed revisions simplify the

information and criteria needed to identify cultural affiliation by removing extraneous or duplicative language that has often been a barrier to repatriation. The proposed revisions also clearly explain that more than one Indian Tribe or NHO may have a cultural affiliation to human remains or cultural items.

For example, assume that the only information available for individual human remains shows that the human remains were removed from a particular site and that the human remains have a date range spanning 1,000 years. Indian Tribe A has a relationship of shared group identity to an earlier group who occupied the site at some point during that 1,000-year span. Similarly, Indian Tribe B has a shared group identity with a different earlier group that also occupied the site at different point during that 1,000-year span. Even though Indian Tribe A and Indian Tribe B do not themselves have a relationship of shared group identity, both Indian Tribe A and Indian Tribe B have a cultural affiliation with the human remains from that site.

In response to consultation with Indian Tribes and NHOs, the Department emphasizes that “a preponderance of the evidence” is a similar standard to a “reasonableness” requirement, both of which are common legal concepts. In both standards, a “more likely than not” assessment is required, such that the reasonableness requirement for tracing cultural affiliation is satisfied by a preponderance of the evidence establishing cultural affiliation. Congressional report language states cultural affiliation “shall be established by a simple preponderance of the evidence,” and that phrase is used in the proposed revisions.

## 2. Geographical affiliation.

For geographical affiliation, the proposed revisions draw on language in the Act requiring the identification of “the geographical and cultural affiliation” (25 U.S.C. 3003(a)) and include the information and criteria needed to establish geographical affiliation. The proposed revisions clarify, as under the existing regulations at §10.11,

“geographical affiliation” is identified by tracing a relationship between an Indian Tribe or NHO and a geographic area connected to the human remains or cultural items. While cultural affiliation requires a simple preponderance of the evidence given the information available, geographical affiliation only requires that the information be available. The proposed revisions also clearly explain that more than one Indian Tribe or NHO may have a geographical affiliation to human remains or cultural items.

For example, assume that the geographic area connected to human remains and associated funerary objects is the Tribal lands of Indian Tribe L, the adjudicated aboriginal land of Indian Tribe N, and the acknowledged aboriginal land of Indian Tribes M, N, O, and P. All the Indian Tribes (L, M, N, O, and P) have a geographical affiliation with the human remains. Any information beyond the geographic area, for example when the human remains or cultural items were removed or types of associated funerary objects, may provide information sufficient to identify a more specific cultural affiliation to one or more of the Indian Tribes but must not be used to limit the geographical affiliation to all the Indian Tribes.

The proposed revision states (in response to consultation with Indian Tribes and NHOs) that the information used to identify geographical affiliation may provide information sufficient to also establish cultural affiliation. Because geographical information is one line of information that may be used for cultural affiliation, that information alone may be sufficient to establish cultural affiliation as well as geographical affiliation.

### 3. Multiple Affiliations and Closest Affiliations.

The proposed revisions provide clear instructions to Indian Tribes, NHOs, museums, and Federal agencies for making and considering single claims or requests and for resolving competing claims or requests by identifying the Indian Tribe or NHO with the closest affiliation (see proposed §10.3(c) and (d)). The proposed revisions clearly

explain that two or more Indian Tribes or Native Hawaiian organization may submit a claim for disposition or a request for repatriation and may claim joint disposition or request joint repatriation of human remains or cultural items. Joint claims or requests are considered a single claim or request and not competing claims or requests.

In rare cases when there are competing claims or requests, museums and Federal agencies must identify the “closest cultural affiliation” (25 USC 3002(a)(2)(B)) and the “most appropriate claimant” (25 USC 3005 (e)). The Act provides no process for making these identifications, but in the inventory and notification provisions of the Act (25 USC 3003(d)(2)(B) and (C)), there is a distinction made between two types of cultural affiliation: clearly identifiable as to tribal origin and not clearly identifiable as being culturally affiliated but determined by a reasonable belief. The Department proposes to use this language to inform how a museum or Federal agency might resolve competing claims for disposition or requests for repatriation. The standard for establishing cultural affiliation in the first instance is always a preponderance of the evidence, but when multiple Indian Tribes or NHOs meet that standard and have submitted competing claims or requests, these paragraphs provide a priority order to differentiate between culturally affiliated Indian Tribes. In resolving competing claims or requests, a museum or Federal agency may identify one or more Indian Tribes or NHOs with the closest affiliation.

Table 4 shows how the Department proposes to reorganize the existing regulatory requirements regarding cultural or geographical affiliation.

**Table 4: Cross-Reference of Existing Provisions to Proposed §10.3**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.14(c)	Criteria for determining cultural affiliation.	10.3(a)	Cultural affiliation. (1) Information. (2) Criteria. (3) Multiple cultural affiliations.
10.14(f)	Standard of proof.		
10.14(d)	A finding of cultural affiliation...		
10.14(e)	Evidence.		

10.11(c)	Disposition of culturally unidentifiable human remains and associated funerary objects.	10.3(b)	Geographical affiliation. (1) Information. (2) Criteria. (3) Multiple geographical affiliations.
	New	10.3(c)	Multiple affiliations.
	New	10.3(d)	Closest affiliation.
10.14(a)	General.		Removed.
10.14(b)	Criteria for determining lineal descent.	10.2	Lineal descendant means:

#### E. Section 10.4 General

This section of the proposed rule would provide a general overview to Subpart B and clarify the responsibilities of Indian Tribes, NHOs, Federal agencies, and the State of Hawai‘i Department of Hawaiian Home Lands (DHHL) for human remains or cultural items on Federal or Tribal lands. This section would consolidate general information in the existing regulations at §§10.3, 10.4, and 10.5. The Department proposes to revise the title of Subpart B (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for this section of the Act (25 U.S.C. 3002).

##### 1. Appropriate Official

The Department proposes to employ a new term, “appropriate official,” to denote the person or persons responsible for completing the regulatory requirements related to a discovery, excavation, and disposition of human remains or cultural items on Federal or Tribal lands. The revision would improve consistency with the Act by requiring certain actions be taken by the appropriate official for an Indian Tribe, NHO, Federal agency, and DHHL concerning discoveries, excavations, and disposition on Federal or Tribal lands.

##### 2. Plan of Action

On all Federal lands in the United States or on some Tribal lands in Hawai‘i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to move the existing regulatory requirement for a plan of action to the beginning of the subpart. In the existing regulations, §10.5(e) requires Federal agency officials to prepare, approve, and sign a written plan of action after consultation and before a planned activity that may result in the excavation of human remains or cultural items. The proposed revisions would require a plan of action before for any planned activity that may result in the discovery or excavation of human remains or cultural items as well as after a discovery of human remains or cultural items and before authorizing an excavation that may result in the discovery or excavation of human remains or cultural items. The Department proposes to simplify the plan of action in three separate steps (see proposed §10.4(b)): (1) Step 1 – Initiate consultation; (2) Step 2 – Consult with requesting parties; and (3) Step 3 – Approve and sign the plan of action. Consulting parties listed in §10.4(b)(1) would not be considered the same as consulting parties under other applicable law, specifically under 36 CFR part 800. The Department proposes to use specific terms to clarify the distinction between a consulting party (as defined in §10.4(b)(1)(i)) and a requesting party (any consulting party that submits a written request to consult).

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible, on the content of the plan of action. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. The consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties to the plan of action. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required. The Department proposes to remove some of the existing requirements for a plan of action that are not necessary and overly intrusive. Depending on the results of

consultation, any of these elements may be included in a plan of action but are no longer the minimum requirement for a plan of action. Specifically, the Department proposes to remove the following items from a plan of action in the existing regulations at §10.5(e):

- (1) The kinds of objects considered as cultural items;
- (2) The specific information used to determine disposition;
- (4) The planned archaeological recording;
- (5) The kinds of analysis planned for each kind of object; and
- (8) The nature of reports to be prepared.

The Department proposes to include in a plan of action the preference of requesting parties for stabilizing and covering human remains or cultural items in situ, protecting and relocating human remains or cultural items, if removed, or providing appropriate treatment, care, or handling of human remains or cultural items. For example, under the proposed regulations, a plan of action might indicate that requesting parties prefer protection of human remains or cultural items in situ, but when that is not possible, the plan of action may require that the appropriate official protect and relocate the human remains or cultural items by burying them in a nearby location. Once disposition under §10.7 is complete (including any required notice publication and claim), the claimants may determine the care, custody, or physical transfer of the human remains or cultural items, including deciding to leave the human remains or cultural items buried in the nearby location.

In response to consultation with Indian Tribes and NHOs and based the experience of Federal agencies with these requirements since 1990, the Department is aware of a preference by some Indian Tribes for allowing natural exposure or erosion of human remains or cultural items to continue, without covering or removing human remains or cultural items. In those cases, a plan of action may indicate that requesting parties prefer the appropriate official take no action upon the discovery of human remains

or cultural items that are naturally exposed. The plan of action should also indicate what the appropriate official will do if the human remains or cultural items cannot be left in place. If disposition under §10.7 is required because the human remains or cultural items could not be left in place, the claimants (after notice publication and claim, if required) may determine the care, custody, or physical transfer of the human remains or cultural items, including returning them to a safe location to continue a natural process.

### 3. Comprehensive Agreement

The Department proposes to retain the option for Federal agencies or DHHL to enter into a comprehensive agreement for all land managing activities on Federal or Tribal lands under its responsibility. The proposed regulations would require a comprehensive agreement be consented to by a majority of requesting parties and include, at minimum, the information required in a plan of action.

Table 5 shows how the Department proposes to reorganize the existing regulatory requirements on Federal or Tribal lands after November 16, 1990.

**Table 5: Cross-Reference of Existing Provisions to Proposed §10.4**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.3(c)	Procedures. (1)...determine whether a planned activity may result...	10.4	To ensure compliance with the Act, any permit, license, lease...
10.4(g)	Notification requirement in authorizations.		
	New	10.4(a)	Appropriate official.
10.5(b)	Initiation of consultation.	10.4(b)	Plan of action. (1) Step 1: Initiate consultation.
10.5(a)	Consulting parties.		(2) Step 2: Consult with requesting parties.
10.5(c)	Provision of information.		
10.5(d)	Requests for information.		(3) Step 3: Approve and sign the plan of action.
10.5(e)	Written plan of action.		
10.5(f)	Comprehensive agreements.	10.4(c)	Comprehensive agreement.
10.3(c)	Procedures. (3)...planned activity subject to NHPA...	10.4(d)	Federal agency coordination with other laws.



10.4(f)	Federal agency officials.		
10.5(g)	Traditional religious leaders.		Removed. See §§10.2 and 10.4(b)(2).

#### F. Section 10.5 Discovery

This section of the proposed rule would implement the requirements of the Act regarding a discovery of human remains or cultural items on Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(d)). This section would include and clarify the requirements in the existing regulations at §10.4(b) through (e) regarding discoveries.

##### 1. Reporting and Documentation Requirements Upon Discovery

The proposed language in §10.5(a) and (b) would prescribe specific reporting and documentation procedures that any person who knows or has reason to know of a discovery must take upon discovery of human remains or cultural items. Specifically, the proposed language would:

- Establish reporting timeframes (immediately with written documentation in 24 hours), requirements to secure and protect the discovery, and documentation requirements to include the location and contents of the discovery.
- Provide clear instructions for reporting the discovery in Table 1 to §10.5, which identifies the appropriate official and the additional point of contact who must be informed of a discovery, based on the location of the discovery.

##### 2. Timeframes to Respond to Discovery

The Department also proposes to require the appropriate official respond to any discovery on Federal or Tribal lands and keep the existing regulations' timeline of three days. On Tribal lands, the existing regulations only recommend actions by an appropriate official by using the verb "may" in the existing regulation at §10.4(e). The Department proposes to change this to require, on Tribal lands in Alaska and the continental United States, that the appropriate official for an Indian Tribe respond to a discovery and certify

that an activity may resume (see proposed §10.5(c) and (e)), with an option to delegate this responsibility to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for discoveries on its Tribal lands; otherwise DHHL is responsible for discoveries on Tribal lands in Hawai‘i. Table 6 shows the name of each requirement and a shortened version of the deadline in the proposed revisions.

**Table 6: Discovery**

<b>Requirement</b>	<b>Deadline (no later than)</b>
Report a discovery	24 hours after a discovery
Cease any nearby activity	Immediately
Respond to a discovery	3 days after a report of a discovery
Approve and sign a plan of action	30 days after a report of a discovery
Certify an activity may resume	35 days after a report of a discovery
Resume an activity	30 days after certification

### 3. Plan of Action

On all Federal lands in the United States or on Tribal lands in Hawai‘i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to revise the existing notification and consultation requirements for discoveries under §10.4(d)(iii) and (iv) by requiring a plan of action. Although the Act does not require consultation on a discovery, the Department proposes to require the appropriate official, in consultation with Indian Tribes or NHOs, prepare, approve, and sign a plan of action within 30 days of a discovery. The Department hopes that by requiring a plan of action after a discovery, Federal agencies and DHHL will be encouraged to engage in consultation earlier and develop a plan of action prior to a discovery. The requirement for a plan of action is waived if, prior to the discovery, the appropriate official approved and signed a comprehensive agreement or plan of action, or if an NHO agreed to be responsible for discoveries on its Tribal lands.

#### 4. Certification and Resumption of Activity

The Department proposes to provide additional time for the appropriate official to certify an activity related to a discovery may resume. In the existing regulations at §10.4(d) and (e), the appropriate official on Federal or Tribal lands must certify receipt of a notification of a discovery within three days and the activity related to the discovery may resume 30 days later. The existing regulations do not allow for any additional time and do not provide a mechanism for the appropriate official to prevent an activity from resuming 33 days after a discovery.

The Department proposes to build in an additional 35 days, if needed, for consultation with Indian Tribes and NHOs, evaluation of the discovery, and to carry out a plan of action (see proposed §10.5(e)). The Department is specifically seeking input during public comment on this timeline. The Act requires that an activity may resume 30 days after the appropriate official certifies that notification of a discovery was received (25 U.S.C. 3002(d)(1), last sentence). The legislative history clearly indicates that reporting a discovery is not meant to be an impediment to resuming a lawful activity on Federal or Tribal lands. However, the Department proposes to allow an additional 35 days in the timeline by separating the requirements for responding to a discovery within 3 days from the requirements for certifying that an activity may resume within 30 days. This would allow a maximum of 65 business days (35 business days to certify and 30 business days later resume the activity) after a discovery on Federal or Tribal lands before an activity could resume. If the appropriate official determines an earlier date for resuming the activity is acceptable, there is no restriction against certifying the activity may resume within less than 65 days. The proposed change would allow the appropriate official more time, if needed, to consult with Indian Tribes and NHOs, evaluate the potential need for an excavation, and carry out the steps in a plan of action.

Table 7 shows how the Department proposes to reorganize the existing regulatory requirements regarding a discovery.

**Table 7: Cross-Reference of Existing Provisions to Proposed §10.5**

<b>Existing 43 CFR Section</b>		<b>Proposed 43 CFR Section</b>	
10.4(b)	Discovery.	10.5(a)	Report any discovery.
10.4(c)	Ceasing activity.	10.5(b)	Cease any nearby activity.
10.4(d) 10.4(e)	(1) As soon as possible, but no later than three (3) working days...	10.5(c)	Respond to a discovery.
10.4(d)	(1) (iv) Initiate consultation...	10.5(d)	Approve and sign a plan of action.
10.4(d) 10.4(e)	(2) Resumption of activity.	10.5(e)	Certify that an activity may resume.
10.4(a)	General.		Removed.

#### G. Section 10.6 Excavation

This section of the proposed rule would implement the requirements of the Act regarding excavation of human remains or cultural items on Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(c)). This section would include and clarify the requirements in the existing regulations at §10.3(b) and (c) regarding excavations.

##### 1. Jurisdiction to Issue ARPA Permit

The Department proposes to revise the existing regulations to clarify the jurisdiction of a Federal agency to issue a permit under Section 4 of the Archaeological Resources Protection Act (ARPA) for an excavation. This proposed change, based on the legislative history of NAGPRA, would address requests from Federal agencies and DHHL to correct the scope of jurisdiction in the existing regulations at §10.3(b)(1), which requires the Bureau of Indian Affairs to take certain actions on private lands for which they do not have jurisdictional authority. The Department proposes that an excavation on Federal or Tribal lands would only require a permit under the ARPA (16 U.S.C. 470cc) if the excavation would occur on “Indian lands” or “public lands” under

ARPA (referred to and defined as “ARPA Indian lands” and “ARPA public lands”), subject to the exemptions in the ARPA Uniform Regulations. ARPA’s definition of “Indian lands” and “public lands” is narrower than “Tribal lands” and “Federal lands” under NAGPRA, which is why the Department proposes to include the ARPA definitions in these proposed regulations. The legislative history of NAGPRA makes clear that Congress intended to protect human remains and cultural items by requiring ARPA permits be issued for NAGPRA excavations when a permit is also required under ARPA.

## 2. Requirement for Consent to Excavation

Consistent with the Act, the proposed language in §10.6(a) would require, on Tribal lands, an Indian Tribe or NHO to consent in writing to an excavation. On Tribal lands in Alaska and the continental United States, an Indian Tribe may delegate this responsibility to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for excavations on its Tribal lands; otherwise DHHL is responsible for excavations on Tribal lands in Hawai‘i.

## 3. Requirement for Plan of Action Prior to Authorizing Excavation

On all Federal lands in the United States or on Tribal lands in Hawai‘i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to revise the notification and consultation requirements for excavations under existing §10.3(c)(1) by requiring a plan of action prior to authorizing an excavation of human remains or cultural items. The Act requires consultation with the appropriate Indian Tribe or NHO prior to permitting an excavation, and the Department proposes to require the appropriate official, in consultation with Indian Tribes and NHOs, prepare, approve, and sign a plan of action prior to authorizing an excavation of human remains or cultural items as proof of consultation. The Department hopes that by requiring a plan of action before authorizing an excavation, Federal agencies and DHHL will be encouraged to engage in consultation earlier and develop a plan of action prior to any need for an excavation. The

requirement for a plan of action is waived if, prior to authorizing the excavation of human remains or cultural items, the appropriate official approved and signed a comprehensive agreement or plan of action, or if an NHO agreed to be responsible for excavations on its Tribal lands.

Table 8 shows how the Department proposes to reorganize the existing regulatory requirements regarding excavation and consultation.

**Table 8: Cross-Reference of Existing Provisions to Proposed §10.6**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.3(b)	Specific Requirements. (1) ...following the requirements of ARPA...	10.6	A permit under Section 4 of ARPA is required when...
10.3(b)	(2) ...in the case of tribal lands, consent of, the appropriate... (4) Proof of the consultation or consent is shown...	10.6(a)	On Tribal lands.
10.3(c)	Procedures. (4) ...on tribal lands, the Indian tribe or NHO may...		
10.3(c)	Procedures. (1) ...the Federal agency official must notify in writing... (2) ...must complete a written plan of action...	10.6(b)	On Federal lands in the United States or on Tribal lands in Hawai‘i.
10.3(a)	General.		Removed.
10.3(b)	(3) The disposition of the objects...		Removed.

#### H. Section 10.7 Disposition

This section of the proposed rule would implement the requirements of the Act regarding the disposition of human remains or cultural items removed from Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(a) and (b)). This section would include and clarify the requirements in the existing regulations at §§10.6 and 10.7 regarding dispositions.

1. Consistent use of the term “disposition”

The Department proposes to replace the term “disposition” in the existing regulations with two separate terms: “disposition” and “repatriation.” In the proposed revision, “disposition” applies consistently throughout but only to Subpart B. In the existing regulations, “disposition” and the undefined word custody are used interchangeably at times while “disposition” is also used as a catch-all term for any transfer of human remains or cultural items under the regulations. The Act uses the terms “ownership,” “right of control of the disposition,” and “disposition of and control over” in describing this process (25 U.S.C. 3002). In the proposed revision, “disposition” is the title of this section and means the appropriate official acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items removed from Federal or Tribal lands.

2. Timeline for disposition.

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that disposition occur as soon as possible, but no later than one year, after the discovery or excavation of human remains or cultural items on Federal or Tribal lands. In the existing regulations, there is no deadline for disposition, and the Department is aware of many instances where human remains or cultural items have not completed the regulatory process for years or even decades after discovery or excavation. This timeline will ensure that, on all Federal lands in the United States or on Tribal lands in Hawai‘i, when disposition cannot be completed within one year, the Federal agency or DHHL reports the human remains or cultural items to the Manager, National NAGPRA Program.

The Department proposes to clarify the requisite steps for disposition by establishing a step-by-step process with corresponding deadlines. Table 9 shows the name of each step and a shortened version of the deadline in the proposed revisions.

**Table 9: Step-by-Step Process for Disposition**

<b>Step Number and Name</b>	<b>Deadline (no later than)</b>
Step 1 – Inform consulting parties.	6 months after a discovery or excavation
Step 2 – Submit a notice of intended disposition.	6 months after Step 1
Step 3 – Receive and consider a claim for disposition.	Any time after notice publication
Step 4 – Respond to a claim for disposition.	30 days after Step 3
Step 5 – Disposition of the human remains or cultural items.	90 days after Step 4

3. Priority for disposition.

The Department proposes to simplify and clarify information contained in the existing regulations at §10.6(a). The proposed revisions are consistent with the Act and the existing regulations in establishing the priority for disposition (see proposed §10.7(a)), which can be simplified to be:

- (1) Lineal descendants,
- (2) Tribal lands Indian Tribe or NHO,
- (3) Indian Tribe or NHO with clear cultural affiliation,
- (4) Indian Tribe or NHO with reasonably identified cultural affiliation,
- (5)(i) Adjudicated aboriginal land Indian Tribe, and
- (5)(ii) Indian Tribe with a stronger cultural relationship than (5)(i).

4. Align disposition to a lineal descendant or on Tribal lands to the Act

The Department proposes to remove the requirement in the existing regulations at §10.6(c) for publishing notices or requiring claims for disposition to a lineal descendant. The existing regulations do not provide any requirements for disposition of human remains or cultural items from Tribal lands. The Department proposes to require written documentation for disposition to a lineal descendant or on Tribal lands to better align with the Act (25 U.S.C. 3002(a)(1) and (2)(A); note the lack of a requirement for a notice or claim). On Tribal lands in Alaska and the continental United States, an Indian Tribe



may delegate its responsibilities for disposition to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for dispositions on its Tribal lands; otherwise DHHH is responsible for dispositions on Tribal lands in Hawai‘i.

5. Revise requirements for notices and claims for disposition.

The Department proposes to revise language in the existing regulations at §10.6(c) describing the requirements for Federal agencies to publish notices, receive claims, and complete dispositions in one paragraph with long, complex sentences. On all Federal lands in the United States and on Tribal lands in Hawai‘i, the proposed revisions would provide five clearly written steps to complete the disposition of human remains or cultural items and establish deadlines and timelines.

The Department proposes to change the notice publication requirement in the existing regulations at §10.6(c) that requires two publications of a notice in local area newspapers at least one week apart. This requirement has become increasingly burdensome given the general changes in newspaper publications since 1995. The Department proposes to require only one publication in the *Federal Register* by the Manager, National NAGPRA Program.

The Department proposes a new requirement for completing dispositions by sending claimants and the Manager, National NAGPRA Program, a written disposition statement. In the case of joint claims for disposition, the disposition statement would identify and be sent to all claimants. In the case of competing claims for disposition, the proposed revisions give guidance and timelines for identifying the most appropriate claimant and completing the disposition. The Act requires that the Federal agency apply the priority order and determine the “closest cultural affiliation” based on the evidence before it (25 USC 3002(a)(2)(B)) and does not provide for a stay of disposition to acquire further evidence or information.

## 6. Unclaimed human remains or cultural items

The Department proposes to move the existing section at §10.7 to be a paragraph under the larger disposition section and modify the existing timeline. On all Federal lands in the United States or on Tribal lands in Hawai‘i, when disposition cannot be completed within one year of a discovery, excavation, or notice of intended disposition, the proposed revisions require that the Federal agency or DHHL must report the human remains or cultural items to the Manager, National NAGPRA Program. These provisions would apply to any human remains or cultural items that were discovered or excavated on Federal lands in the United States or on Tribal lands in Hawai‘i after November 16, 1990, even if it has been more than one year since the discovery, excavation, or notice of intended disposition. Federal agencies and DHHL should submit a list of all unclaimed human remains or cultural items removed from Federal or Tribal lands. As in the existing regulations at §10.7(c) through (e), the proposed revisions would provide a process whereby a Federal agency or DHHL may transfer or reinter unclaimed human remains or cultural items, after it publishes a notice of proposed transfer or reinterment.

The Department proposes to clarify the requisite steps for unclaimed human remains or cultural items by establishing a step-by-step process with corresponding deadlines. Table 10 shows the name of each step and a shortened version of the deadline in the proposed revisions.

**Table 10: Step-by-Step Process for Unclaimed Human Remains or Cultural Items**

<b>Step Number and Name</b>	<b>Deadline (no later than)</b>
Step 1 – Submit a list of unclaimed cultural items.	1 year after effective date, update by Dec 31 each year
Step 2 – Agree to transfer or decide to reinter human remains or cultural items.	Any time after Step 1
Step 3 – Submit a notice of proposed transfer or reinterment.	30 days after Step 2
Step 4 – Transfer or reinter the human remains or cultural items.	90 days after Step 3

Table 11 shows how the Department proposes to reorganize and revise the existing regulatory requirements regarding disposition.

**Table 11: Cross-Reference of Existing Provisions to Proposed §10.7**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.6(a)	Priority of custody.	10.7(a)	Priority for disposition.
	New	10.7(b)	To a lineal descendant.
10.15(d)	Savings provisions.		(3) After the disposition statement is sent...
	New	10.7(c)	On Tribal lands.
10.15(d)	Savings provisions.		(4) After the disposition statement...
10.10(c)	(3) ...from expressly relinquishing title to...		
10.6(c)	Final notice, claims and disposition with respect to Federal lands.	10.7(d)	On Federal lands in the United States or on Tribal lands in Hawai‘i.
			(1) Step 1: Inform consulting parties.
			(2) Step 2: Submit a notice of intended disposition.
			(3) Step 3: Receive and consider a claim for disposition.
			(4) Step 4: Respond to a claim for disposition.
			(5) Step 5: Disposition of the human remains or cultural items.
10.15(d)	Savings provisions.		(5)(iii) After the disposition statement...
10.10(c)	(3) ...from expressly relinquishing title to...		
10.7	Disposition of unclaimed....	10.7(e)	Unclaimed human remains or cultural items...
10.7(b)	(1) Submit a list of items...		(1) Step 1: Submit a list of unclaimed human remains or cultural items.
10.7(c)	...upon request, transfer...		(2) Step 2: Agree to transfer or decide to reinter human remains or cultural items.
10.7(d)	...reinter...		(3) Step 3: Submit a notice of proposed transfer or reinterment.
10.7(e)	(2) Publish a notice of the proposed transfer or reinterment...		
	New		(4) Step 4: Transfer or reinter the human remains or cultural items.
10.15(d)	Savings provisions.		(4)(ii) After transfer or reinterment occurs...
10.10(c)	(3) ...from expressly relinquishing title to...		
10.6(b)	Custody of human remains...		Removed.
10.7(b)	(2) Care for and manage... (3) To the maximum extent feasible...	10.1(d)	Duty of care.
10.7(a)	This section carries out...		Removed.

10.7(e)	(1) Submit the list required...		
	(3) Send to the Manager, National NAGPRA Program...		

## I. Section 10.8 General

This section of the proposed rule would provide a general overview to Subpart C and clarify the requirements for museums and Federal agency with possession or control of holdings or collections. The section would consolidate general information in the existing regulations at §§10.8(a), 10.9(a), 10.11(e), and 10.17(a). The Department proposes to revise the title of Subpart C (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for these sections of the Act (25 U.S.C. 3003-3005).

### 1. Clarify who has responsibility for holdings or collections.

The Department proposes to clarify, regardless of the physical location of a holding or collection, who is responsible for carrying out the requirements of the Act. The proposed revisions would provide both museums and Federal agencies with instructions on determining possession or control of holdings or collections. As discussed in the definition section, whether a museum or Federal agency has possession or control is a legal determination that must be made on a case-by-case basis. However, when a museum with custody of human remains or cultural items cannot identify any person, institution, State or local government agency, or Federal agency with possession or control, the museum should presume it has possession or control for purposes of Subpart C. When a Federal agency cannot determine if human remains or cultural items came into its possession or control before or after November 16, 1990, or cannot identify the type of land the human remains or cultural items were removed from, the Federal agency should presume it has possession or control for purposes of Subpart C.

### 2. Museums with custody of a Federal agency holding or collection.

The Department proposes two new requirements aimed at locating Federal collections in non-Federal museums (see proposed §10.8(c)). Specifically, the proposed language would require that:

- A museum must submit a statement describing Federal holdings or collections in its custody to the responsible Federal agency and to the Manager, National NAGPRA Program, no later than one year after the effective date of the final rule; and
- Within 120 days of receiving such a statement, the Federal agency must acknowledge its possession or control of a holding or collection, acknowledge that it does not have possession or control of a holding or collection, or acknowledge it has joint possession or control with the museum.

These new requirements are a direct response to requests from Federal agencies and Indian Tribes who struggle to locate Federal collections in non-Federal museums. In 2010, the Government Accountability Office commented on this issue in its report on Federal agency compliance with the Act. Addressing this issue, the Department's detailed response to the Government Accountability Office's report stated, "These instances illustrate the importance of repositories notifying agencies upon discovery of Federal collections in their possession." This requirement is consistent with the conditions for repositories holding Federal collections under 36 CFR part 79, its referenced Federal property management authorities, and the Secretary's authority to prescribe regulations relating to Indian affairs under 25 U.S.C 9 (*United States v. Eberhardt*, 780 F.2d 1354, 1360 (9th Cir.1986)).

If a museum has custody of a holding or collection from multiple agencies or is unsure which Federal agency has possession or control of the holding or collection, the museum must send information on the holding or collection to any Federal agency that

might have an interest and to the Manager, National NAGPRA Program. If a museum is unsure of who the appropriate point of contact is for a Federal agency, the Department recommends contacting the Federal Preservation Officer to assist in identifying the appropriate agency contact. The Advisory Council on Historic Preservation keeps an updated list at <https://www.achp.gov/protecting-historic-properties/fpo-list>. In responding to such statement, a Federal agency need not perform exhaustive research to determine whether it has possession or control of the collection, but it must merely assess the museum's statement on possession or control based on the information available to the Federal agency.

### 3. Museums with custody of other holdings or collections.

The Department proposes a new requirement for museums with custody of holdings or collections for which the museum cannot identify who has possession or control. The museum would be required to submit a statement describing holdings or collections in its custody for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control. The statement would be sent to the Manager, National NAGPRA Program, no later than one year after the effective date of the final rule. This new requirement is a direct response to requests from Indian Tribes who struggle to determine their rights to holdings or collections in the custody, but not in the possession or control, of a museum. The Manager, National NAGPRA Program, would share this information with appropriate parties to determine possession and control and proceed with the inventory, summary, and repatriation processes.

Table 12 shows how the Department proposes to reorganize and add to the existing regulatory requirements for museum or Federal agency holdings or collections.

**Table 12: Cross-Reference of Existing Provisions to Proposed §10.8**

Existing 43 CFR Section	Proposed 43 CFR Section
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10.8(a) 10.9(a)	General.	10.8(a)	Museum holding or collection.
		10.8(b)	Federal agency holding or collection
	New	10.8(c)	Museums with custody of a Federal agency holding or collection.
		10.8(d)	Museums with custody of other holdings or collections.
10.11(e)	Disputes.	10.8(e)	Contesting actions on repatriation.
10.17(a)	Formal and informal resolutions.		

J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony

This section of the proposed rule would implement the requirements of the Act regarding summaries of holdings or collections to facilitate the repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony (25 U.S.C. 3004 and 3005). In response to consultation with Indian Tribes and NHOs, the Department proposes to retain the existing requirement that a museum or Federal agency prepare a summary for any holding or collection that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony. NAGPRA requires “Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum” (25 U.S.C. 3004(a)). The statutory language is unclear whether summaries should include only the unassociated funerary objects, sacred objects, or objects of cultural patrimony, or the entire collection which may include these cultural items. The Act was enacted for the benefit of Indians and therefore the canon of construction applies that statutes “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). The legislative history and statutory language are clear that the summary is

intended as an initial step in bringing an Indian Tribe and Native Hawaiian organization into consultation with a museum or Federal agency. As Indian Tribes and NHOs noted during consultation, identification of specific sacred objects or objects of cultural patrimony must be done in consultation with Indian Tribe or NHO representatives and traditional religious leaders since few, if any, museums or Federal agencies have the necessary personnel to make such identifications. Further, identification of specific unassociated funerary objects, sacred objects, and objects of cultural patrimony would require a museum or Federal agency to complete an item-by item listing first. That would be directly contrary to Congress's admonition that a summary should not be an object-by-object listing (25 U.S.C. 3004(b)(1)(A)).

The Department proposes to consolidate the requirements for repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony into a seven-step process in a single section. These same requirements are currently spread out among the existing regulations at §§10.8, 10.10, and 10.13. In addition, the Department proposes to add more detailed instructions for evaluating multiple requests for repatriation and resolving stays of repatriation than currently in the existing regulations at §10.10(c).

#### 1. Establish a Step-by-Step Process for Repatriation

The Department proposes to clarify the requisite steps for repatriation by establishing a step-by-step process with corresponding deadlines. Table 13 shows the name of each step and a shortened version of the deadline in the proposed revisions.

**Table 13: Step-by-Step Process for Repatriation**

<b>Step Number and Name</b>	<b>Deadline (no later than)</b>
Step 1 – Complete a summary...	6 months for a new collection
Step 2 – Initiate consultation.	30 days after Step 1
Step 3 – Consult with requesting parties.	10 days after a request, propose a timeline for consultation



Step 4 – Receive and consider a request for repatriation.	Any time after a summary is complete
Step 5 – Respond to a request for repatriation.	60 days after Step 4
Step 6 – Submit a notice of intended repatriation.	30 days after Step 5
Step 7 – Repatriation of the unassociated funerary object, sacred object, or objects of cultural patrimony	90 days after notice publication

The intent of these proposed revisions is to correct inaccuracies and ambiguities in the existing regulations by using a clear, easy to follow, step-by-step process, and ensure a timely resolution of any requests for repatriation. For example, the proposed revisions would clarify, consistent with the Act, that invitations to consult follow the completion of a summary. In the existing regulations at §10.8(d)(2), consultation is initiated “no later than the completion of the summary process.”

The proposed revisions would also directly address a required step that lacks explanation or deadlines in the existing regulations. The Department proposes in Step 5 to require a museum or Federal agency to respond no later than 60 days after receiving a request for repatriation. The Department also proposes four specific options for the response, summarized as follows:

- (1) Accept the request and agree to the repatriation.
- (2) Reject the request, explain why, and ask for more information.
- (3) Assert and prove a right of possession and refuse repatriation.
- (4) Determine the most appropriate requestor among competing requests.

## 2. Update Deadlines, Establish New Timelines, and Clarify Procedures

To update deadlines for completing a summary, the proposed revisions integrate all the deadlines for completing a summary in the first paragraph (see proposed §10.9(a), Table 1 to §10.9). The proposed revisions would identify the past required deadlines for completing a summary (i.e., November 16, 1993). The Act does not clearly indicate when

museums or Federal agencies must complete a summary after the statutory deadline for reporting had passed. The existing regulations at §10.13 provide these requirements for newly acquired or newly regulated holdings or collections beginning in 2007. The proposed revisions use the same deadlines as the existing regulations.

To establish new timelines, the proposed revisions would require in Step 2 a written request to consult. This new requirement for a written request to consult (which can include email) is necessary to then require a museum or Federal agency to respond to the request within 10 days. In this same subparagraph, the proposed revisions require requests to consult be submitted prior to a notice publication. This requirement ensures the repatriation process moves forward by certain deadlines in later steps. After publication of a notice, any party, even if they have not requested to consult, can make a request for repatriation as a competing claim (see proposed §10.9(f)(4)).

To clarify procedures, the proposed revisions would require in Step 4 that any party wishing to make a request for repatriation must do so in writing. In the existing regulations at §§10.8 and 10.10, there are references to making requests for repatriation, but not until the very end of the process under notification in the existing regulations at §10.10(a)(3) is it clear that such a request must be in writing. The Department is specifically seeking input during public comment on the deadlines for responding to a request for repatriation and sending a repatriation statement.

### 3. Require that Consultation Seek Consensus

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties. These requirements

are used throughout the proposed regulations whenever consultation with requesting parties is required.

#### 4. Protect Sensitive Information and Disclose Hazardous Substances

The Department proposes to remove the existing regulations at §10.8(d)(4)(iii) because it requires Indian Tribes and NHOs to provide information about funerary objects, sacred objects, or objects of cultural patrimony. This kind of information is often very sensitive and providing it in writing or in the absence of qualified persons within the Indian Tribe or NHO might be inappropriate. The proposed language would still provide for an exchange of information about the types of objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony, but would do so in a way to allow for sensitive information to be protected.

In the existing regulations at §10.10(e), museums and Federal agencies must inform Indian Tribes and NHOs about any potentially hazardous substances used to treat any of the objects only after repatriation has occurred. The proposed revisions would require a museum or Federal agency to disclose information about the presence of any potentially hazardous substances first in the summary (see proposed §10.9(a)(1)(v)) and second in the notice of intended repatriation (see proposed §10.9(f)(1)(vi)).

#### 5. Clarify Requirements for Notices

The proposed revisions clearly outline informational requirements for a *Federal Register* notice and do so with greater detail than the existing regulations at §10.8(f). To protect potentially sensitive information, the only location information that would be required is the county and State where the unassociated funerary object, sacred object, or object of cultural patrimony were removed, if known. Other informational requirements of a *Federal Register* notice would include: 1) the identification of the cultural item specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony; 2) the requestor,

with no requirement that other lineal descendants or Indian Tribes or NHOs with cultural affiliation be listed in the notice; and 3) a brief abstract of the information showing the requestor is a lineal descendant or an Indian Tribe or NHO with cultural affiliation.

In enumerating the unassociated funerary objects, sacred objects, or objects of cultural patrimony in a notice, museums and Federal agencies would be encouraged to count in a way that reduces the chances of having to issue a correction notice. For example, identifying 3 lots of shell beads means that no matter the exact number of beads present, the count would stand, whereas identifying exactly 1,960 shell beads in a notice would mean that if additional (or fewer) beads were located before repatriation occurs, a correction notice would be required because the number of objects would have changed.

#### 6. Written Repatriation Statement

The Department proposes to require a new document to complete the repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor. A written repatriation statement would be sent to and would identify all requestors in the case of joint requests. In accordance with the recommendation by the Government Accountability Office in a 2010 report on the implementation of the Act, a copy of the repatriation statement would also be sent to the Manager, National NAGPRA Program.

Table 14 shows how the Department proposes to reorganize the existing regulatory requirements for repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

**Table 14: Cross-Reference of Existing Provisions to Proposed §10.9**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.8(b)	Contents of summaries.	10.9(a)	Step 1: Complete a summary of...
10.8(e)	Using summaries to determine affiliation.		(1) A summary must include...
10.10(e)	...inform recipients of repatriation...treatment		(1)(v) The presence of any potentially hazardous substances...

Existing 43 CFR Section		Proposed 43 CFR Section	
	with potentially hazardous substances		
10.13(b)	New holdings or collections.		(2) After [effective date of final rule], ...must submit a summary...
10.13(d)	New Federal funds.		(3) Prior to [effective date of final rule], ...must have submitted a summary...
10.8(c)	Completion.		(4) After [effective date of final rule], ...acquires possession or control of a holding or collection that contains...
10.13(b)	(3) Previously prepared summary or inventory...		
10.8(d)	Consultation.	10.9(b)	Step 2: Initiate consultation.
	(1) Consulting parties.		(1) Consulting parties are...
	(2) Initiation of consultation.		(2) An invitation to consult must...
	New		(3) Any consulting party...must...
			(4) ...identifies a new consulting party...
10.13(c)	New Indian Tribes.		(4)(ii) ...after the addition of a Tribal entity to the list of federally recognized Indian Tribes...
10.8(d)	(4) Requests for information.	10.9(c)	Step 3: Consult with requesting parties. (1) ...a museum or Federal agency must ask for the following information...
	New		(2) The consultation process must... (3) The museum or Federal agency must prepare a record of consultation...
10.8(d)	(3) Provision of information		(4) ...A museum or Federal agency must provide access to the additional information...
	New	10.9(d)	Step 4: Receive and consider a request for repatriation. (1) A request for repatriation...must be received... (2) Requests from two or more...
10.10(a)	(1) Criteria.		(3) A request for repatriation must satisfy...
	New	10.9(e)	Step 5: Respond to a request for repatriation.
10.8(f)	Notification.	10.9(f)	Step 6: Submit a notice of intended repatriation
10.10(e)	...treatment with potentially hazardous substances		(1) (vi) ...the presence of any potentially hazardous
10.13(b)	(2) Additional pieces or fragments...		(3) If the number or identity... changes...

Existing 43 CFR Section		Proposed 43 CFR Section	
10.13(e)	Amendment of previous decision.		
10.10(a)	(3) Notification.	10.9(g)	Step 7: Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.
10.10(d)	Place and manner of repatriation		
10.10(f)	Record of repatriation		
10.15(d)	Savings provisions.		
10.10(c)	(2) Circumstances where there are multiple requests for repatriation...	10.9(h)	Evaluating competing requests for repatriation.
10.10(c)	Exceptions.	10.9(i)	Stay of repatriation.
10.8(d)	(4)(iii) Kinds of cultural items....		Removed.

#### K. Section 10.10 Repatriation of Human Remains and Associated Funerary Objects

This section of the proposed rule would implement the requirements of the Act regarding inventories of holdings or collections to facilitate the repatriation of human remains and associated funerary objects (25 U.S.C. 3003 and 3005). The Department proposes to consolidate the requirements for repatriation of human remains and associated funerary objects into an eight-step process in a single section. These same requirements are currently spread out among the existing regulations at §§10.9, 10.10, 10.11, and 10.13. In addition, the Department proposes to add more detailed instructions for evaluating multiple requests for repatriation and resolving stays of repatriation than currently in the existing provisions at §10.10(c).

##### 1. Eliminate “Culturally Unidentifiable”

On March 15, 2010, the Department issued a final rule with request for comment that codified procedures for the disposition of culturally unidentifiable Native American human remains in the possession or control of museums or Federal agencies (75 FR 12378, March 15, 2010). These procedures require museums and Federal agencies to consult with, and transfer control of, culturally unidentifiable human remains to the

Indian Tribes and NHOs from whose Tribal lands or from whose aboriginal lands the human remains were removed.

Comments on the March 15, 2010, final rule raised concerns that the financial burden on museums of consultation and disposition of culturally unidentifiable human remains would be “tremendous,” “onerous,” “overwhelming,” “ruinous,” or “significant.” However, since the Act became law in 1990, museums and Federal agencies have accounted for over 84,000 Native American human remains in notices, including over 21,000 culturally unidentifiable human remains, with no indication that a single museum has suffered overwhelming or ruinous consequences from compliance with the Act. Every year since 1994, Congress has provided approximately \$2 million dollars in grant funds for consultation and repatriation activities to assist in compliance with the Act.

Comments for the March 15, 2010, final rule also raised questions about what types of relationships were required for disposition of culturally unidentifiable human remains. Using a geographic relationship between an Indian Tribe or NHO and human remains and associated funerary objects for the purpose of repatriation aligns with the Act’s requirements for museums and Federal agencies to “identify the geographical and cultural affiliation of such items” and with the general intent of repatriation under the Act. As noted in the response to comments for the March 15, 2010, final rule, the disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian Tribes and NHOs based on criteria other than cultural affiliation was clearly anticipated by Congress.

Section 3002(a)(2) of the Act which was used as the model for the March 15, 2010, final rule specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony removed from Federal or Tribal lands after November 16, 1990 to the Indian Tribe or NHO on whose Tribal lands the human remains or cultural items were removed, to the Indian Tribe or NHO with cultural

affiliation to the human remains or cultural items, or to the Indian Tribe having aboriginally occupied the Federal land where the human remains or cultural items were removed. Significantly, under the Act, ownership or control of human remains or cultural items based on Tribal lands origin is given a higher priority than cultural affiliation. Consistent with the terms of the Act, the 2010 rule codified a process for disposition of culturally unidentifiable human remains to the Indian Tribe or NHO from whose Tribal lands, at the time of excavation or removal, or from whose aboriginal land the human remains were removed. In addition to the Act, the implementing regulations rely on the specific recommendations from the Review Committee for disposition of culturally unidentifiable human remains and additional information gleaned from culturally unidentifiable inventories. The existing regulations are consistent with the Department's determination that it was reasonable and appropriate for the disposition of culturally unidentifiable human remains to be based on geographical information given that the designation of "culturally unidentifiable" is often due to a lack of information occasioned by some collection practices rather than a lack of geographical information.

To streamline the existing regulations at §10.11 regarding disposition of human remains and associated funerary objects currently referred to as culturally unidentifiable, the Department proposes to incorporate the concepts underlying the existing regulations more logically into the overall inventory and repatriation process. As a result, the Department also proposes to generally remove the term "culturally unidentifiable" as the streamlining of these concepts would make this term no longer serve a useful regulatory purpose. Further, this proposed change is intended to more accurately reflect the geographically focused analysis required for an inventory of human remains and associated funerary objects. As discussed above, the proposed revisions identify two kinds of affiliation for purposes of repatriation: cultural or geographical. As discussed in more detail below, the proposed revisions would require that an inventory of human



remains and associated funerary objects include determinations of both cultural and geographical affiliation or an explanation why no affiliation could be identified.

## 2. Require Repatriation of Associated Funerary Objects

While the existing regulations at §10.11 mandate the disposition of certain categories of culturally unidentifiable human remains by museums and Federal agencies upon receipt of a claim, the transfer of culturally unidentifiable associated funerary objects under the existing regulations is at the discretion of the museum or Federal agency. Following publication of the 2007 proposed rule (72 FR 58582, October 16, 2007), the Department received numerous comments on the voluntary transfer of culturally unidentifiable associated funerary objects. Most of the comments stated that transfer of such objects should also be mandatory. These comments were carefully considered, but the Department determined that this area of law was not clearly resolved at that time and needed further consideration. The March 15, 2010, final rule retained the voluntary transfer provision. After the publication of the final rule, the Department received additional comments on this issue, which have been reviewed in the development of the proposed revisions.

The Department proposes to require repatriation of associated funerary objects whenever repatriation of the related human remains occurs. In the Act, Congress differentiated human remains and associated funerary objects from unassociated funerary objects, sacred objects, and objects of cultural patrimony. Congress did this both in its treatment of these items throughout the Act and in its assessment of the potential legal interests at stake for those items, for example, by differentiating the use and analysis of right of possession for human remains and associated funerary objects from a right of possession for cultural items. With respect to the Act, Congress acknowledged that no general property interest exists either in human remains or in the funerary objects associated with them in a burial. This follows common law principles indicating that the

next-of-kin of a deceased individual have a quasi-property right of control over the lawful disposition of the decedent's remains. For these reasons, the proposed revision would require repatriation of associated funerary objects whenever the repatriation of human remains is required. Such an action, based on this guidance from Congress, would not result in a taking of property within the meaning of the Fifth Amendment of the United States Constitution.

### 3. Establish a Step-By-Step Process for Repatriation

The Department proposes to clarify the requisite steps for repatriation of human remains and associated funerary objects by establishing a step-by-step process with corresponding deadlines. Table 15 shows the name of each step and a shortened version of the deadline in the proposed revisions.

**Table 15: Step-by-Step Process for Repatriation**

<b>Step Number and Name</b>	<b>Deadline (no later than)</b>
Step 1 – Compile an itemized list of human remains and associated funerary objects.	Before deadline in Step 4
Step 2 – Initiate consultation.	Before deadline in Step 4
Step 3 – Consult with requesting parties.	10 days after a request, propose a timeline for consultation
Step 4 – Complete/update an inventory...	2 years for a new collection/ 2 years after effective date for update
Step 5 – Submit a notice of inventory completion.	6 months after Step 4
Step 6 – Receive and consider a request for repatriation.	Any time after notice publication
Step 7 – Respond to a request for repatriation.	30 days after Step 6
Step 8 – Repatriation of the human remains and associated funerary objects.	90 days after Step 7

The intent of these proposed revisions is to correct inaccuracies and ambiguities in the existing regulations by using a clear, easy to follow, step-by-step process, and ensures a timely resolution of any requests for repatriation. For example, the proposed revisions would clarify, consistent with the Act, that invitations to consult are required

before completing an inventory. In the existing regulations at §10.9(b)(2), consultation is initiated “as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation...is being conducted.”

The proposed revision would also directly address a required step that lacks explanation or deadlines in the existing regulations. The Department proposes in Step 7 to require a museum or Federal agency to respond no later than 30 days after receiving a request for repatriation. The Department also proposes three specific options for the response, summarized as follows:

- (1) Accept the request and agree to the repatriation.
- (2) Reject the request, explain why, and ask for more information.
- (3) Determine the most appropriate requestor among competing requests.
4. Update Deadlines, Establish New Timelines, and Clarify Procedures

To update deadlines for completing an inventory, the proposed revisions integrate all the deadlines in Step 4 (see proposed §10.10(d), Table 1 to §10.10). The proposed revisions would identify the past required deadlines for completing an inventory (i.e., November 16, 1995). The Act does not clearly indicate when museums or Federal agencies must complete an inventory after the statutory deadline for reporting. The existing regulations at §10.13 provided these requirements for newly acquired or newly regulated holdings or collections beginning in 2007. The proposed revisions use the same deadlines as the existing regulations.

To establish new timelines, the proposed revisions would require in Step 2 a written request to consult. This new requirement for a written request to consult (which can include email) is necessary to then require a museum or Federal agency to respond to the request within 10 days. In this same subparagraph, the proposed revisions require requests to consult be submitted prior to a notice publication. This requirement ensures the repatriation process moves forward by certain deadlines in later steps. After

publication of a notice, any party, even if they have not consulted, can make a request for repatriation as a competing request (see proposed §10.10(g)(2)).

To clarify procedures, the proposed revisions would require in Step 6 that any party wishing to make a request for repatriation must do so in writing. In the existing regulations at §§10.9, 10.10, and 10.11, there are references to making requests for repatriation, but not until the very end of the process under notification in the existing regulations at §10.10(b)(2) is it clear that such a request must be in writing. The Department is specifically seeking input during public comment on the deadlines for responding to a request for repatriation and sending a repatriation statement.

#### 5. Require that Consultation Seek Consensus

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required.

#### 6. Require Inventory Determinations and Updates

The proposed revisions would require that an inventory include specific determinations for human remains and associated funerary objects. In the existing regulations at §10.9(d), two separate lists of human remains and associated funerary objects comprise the inventory: 1) those with cultural affiliation and 2) those with no cultural affiliation. The Department proposes to revise this requirement to require, for each entry in the itemized list of human remains and associated funerary objects, a determination of one or more of the following:

- (1) There is a known lineal descendant;
- (2) There is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through cultural affiliation;
- (3) There is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through geographical affiliation; or
- (4) There is no connection between the human remains and associated funerary objects and any Indian Tribe or NHO.

The Department proposes to require museums and Federal agencies update an inventory for any human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion by the effective date of the final rule. To update an inventory, a museum or Federal agency would be required to initiate consultation, consult with requesting parties, and determine if there is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through cultural or geographical affiliation. The updated inventory would be sent to all identified consulting parties and the Manager, National NAGPRA Program, no later than 2 years after the effective date of the final rule. Any museum may request an extension to update its inventory. Consistent with the Act (25 U.S.C. 3003(c)) and the existing regulations at §10.9(f), only museums may request extension to update an inventory. Federal agencies may not request extensions.

#### 7. Protect Sensitive Information and Disclose Hazardous Substances

The Department proposes to remove the existing regulations at §10.9(b)(4)(iii) because it requires Indian Tribes and NHOs to provide information about the kinds of objects they consider to be funerary objects. This kind of information is often very sensitive and providing it in writing or in the absence of qualified persons within the Indian Tribe or NHO might be inappropriate. The proposed language would still provide

for an exchange of information about the types of objects that might be funerary objects but would do so in a way to allow for sensitive information to be protected.

In the existing regulations at §10.10(e), museums and Federal agencies must inform Indian Tribes and NHOs about any potentially hazardous substances used to treat human remains or funerary objects only after repatriation has occurred. The proposed revisions would require a museum or Federal agency to disclose information about the presence of any potentially hazardous substances first in the itemized list (see proposed §10.10(a)(6)) and second in the notice of inventory completion (see proposed §10.10(e)(2)(vii)).

#### 8. Clarify Requirements for Notices

The proposed revisions clearly outline informational requirements for a *Federal Register* notice and reduce the information required in the existing regulations at §10.9(e)(2). To protect potentially sensitive information, the only location information that would be required is the county and State where the human remains and associated funerary objects were removed, if known. To facilitate requests for repatriation, any lineal descendant or Indian Tribe or NHO with cultural or geographical affiliation would be identified in the notice. The notice would require only a brief abstract of the information used to identify the lineal descendant or Indian Tribe or NHO with cultural or geographical affiliation.

In enumerating the associated funerary objects in a notice, museums and Federal agencies would be encouraged to count in a way that reduces the chances of having to issue a correction notice. For example, identifying 3 lots of shell beads means that no matter the exact number of beads present, the count would stand, whereas identifying exactly 1,960 shell beads in a notice would mean that if additional (or fewer) beads were located before repatriation occurs, a correction notice would be required because the number of objects would have changed.

## 9. Written Repatriation Statement

The Department proposes to require a new document to complete the repatriation of human remains and associated funerary objects to a requestor. A written repatriation statement would be sent to and would identify all requestors in the case of joint requests. In accordance with the recommendation by the Government Accountability Office in a 2010 report on the implementation of the Act, a copy of the repatriation statement would also be sent to the Manager, National NAGPRA Program.

## 10. Transfer or Reinterment of Human Remains and Associated Funerary Objects

The Department proposes a new process for transfer or reinterment of human remains and associated funerary objects. This provision would apply in limited circumstances where there is no connection between the human remains and associated funerary objects and any Indian Tribe or NHO. Under such circumstances, a museum or Federal agency would have the discretion to agree to transfer the human remains and associated funerary objects to an Indian Tribe, NHO, or Indian group, or to reinter the human remains and associated funerary objects. In the existing regulations at §10.10(g)(2)(ii), this same process is available to museums and Federal agencies but requires a recommendation from the Review Committee and the concurrence of the Secretary. The new provision would require publication of a notice and a repatriation statement but would eliminate the costly and burdensome process of making a request to the Review Committee.

Table 16 shows how the Department proposes to reorganize the existing regulatory requirements for an inventory of human remains and associated funerary object.

**Table 16: Cross-Reference of Existing Provisions to Proposed §10.10**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.9(c)	Required Information.	10.10(a)	Step 1: Compile an itemized list of human remains...

10.10(e)	...inform recipients of repatriation...treatment with potentially hazardous substances		(6) The presence of any potentially hazardous substances...
10.9(b)	Consultation.	10.10(b)	Step 2: Initiate consultation.
	(1) Consulting parties.		(1) Consulting parties are...
	(2) Initiation of consultation.		(2) An invitation to consult must...
	(3) Provision of information		(3) Any consulting party... must...
	New		(4) ...identifies a new consulting party...
10.13(c)	New Indian Tribes		(ii) ...after the addition of a Tribal entity to the list of federally recognized Indian Tribes...
10.9(b)	(4) Requests for information.	10.10(c)	Step 3: Consult with requesting parties. (1) ...a museum or Federal agency must ask for the following information...
	New		(2) The consultation process must... (3) The museum or Federal agency must prepare a record of consultation...
10.9(e)	(5) ...upon request, additional documentation...		(4) A museum or Federal agency must provide access to the additional information...
10.9(d)	Documents. Two separate documents comprise the inventory:		Step 4: Complete an inventory of human remains...
	(1) a listing of culturally affiliated...	10.10(d)	(1) An inventory must include: (iii) For each entry...a determination of one or more...
	(2) a listing of culturally unidentifiable...		(A) ...a known lineal descendant, (B) ... through cultural affiliation... (C) ... through geographical affiliation...
			(D) There is no connection...
10.9(c)	(4) A summary of the evidence, including consultation...		(iv) An abstract of the information supporting the determination...
10.13(b)	(1) New holdings or collections.	10.10(d)	(2) After [effective date of final rule], ...must submit an inventory...
10.13(d)	New Federal funds.		(3) Prior to [effective date of final rule]...must have submitted an inventory...
10.9(f)	Completion.		(4) No later than [2 years after the effective date of final rule], for any
10.11(b)	Consultation.		



10.11(c)	Disposition of culturally unidentifiable human remains and associated funerary objects. (1) ...must offer to transfer control...		...listed in an inventory but not published in a notice of inventory completion prior to [effective date of final rule]...submit an updated inventory...
10.9(f)	Completion.		(5) Any museum may request an extension to complete or update its inventory...
10.13(b)	(3) Previously prepared summary or inventory...		(6) After [effective date of final rule]...acquires possession or control of human remains...
10.9(e)	Notification.	10.10(e)	Step 5: Submit a notice of inventory completion.
10.11(d)	Notification.		(2) (vii) ...the presence of any potentially hazardous
10.10(e)	...treatment with potentially hazardous substances		(4) If the number ... changes...
10.13(b)	(2) Additional pieces or fragments...		
10.13(e)	Amendment of previous decision		
	New	10.10(f)	Step 6: Receive and consider a request for repatriation. (1) A request for repatriation... must be received... (2) Requests from two or more...
10.10(b)	(1) Criteria.		(3) A request for repatriation must satisfy...
	New	10.10(g)	Step 7: Respond to a request for repatriation.
10.10(b)	(2) Notification.	10.10(h)	Step 8: Repatriation of the human remains and associated funerary objects.
10.10(d)	Place and manner of repatriation		
10.10(f)	Record of repatriation		
10.15(d)	Savings provisions.		
10.10(c)	(2) Circumstances where there are multiple requests for repatriation...	10.10(i)	Evaluating competing requests for repatriation.
10.10(c)	Exceptions.	10.10(j)	Stay of repatriation.
10.11(c)	(5) The exceptions listed at §10.10(c) apply...		
10.15(b)	Failure to claim where no repatriation has occurred. [Reserved].	10.10(k)	Transfer or reinter human remains and associated funerary objects.
10.10(g)	(2)(ii) Recommend to the Secretary specific actions...		
10.9(b)	(4) (iii) kinds of cultural items....		Removed.
10.9(c)	(1) Accession and catalogue entries...		

	(3) A description ...including dimensions, materials...		
10.9(e)	(6) This paragraph applies when a the [sic] museum...		
10.10(g)	Culturally unidentifiable human remains.		
10.11(a)	General.		
10.11(c)	(2) If none of the Indian Tribes or NHOs agree to accept...		
	(3) The Secretary may make a recommendation...		
	(4) ...may also transfer control of funerary objects...		
	(6) Any disposition of human remains from Indian lands...		
10.11(d)	(2) Within 30 days...Manager, National NAGPRA...		

#### L. Section 10.11 Civil Penalties

This section of the proposed rule would implement the requirements of the Act regarding the process for the Secretary to assess civil penalties against any museum that fails to comply with the requirements of the Act (25 U.S.C. 3007). The Department proposes several revisions to the existing regulations at §10.12 to clarify and streamline the process for assessing civil penalties. As noted in the proposed rule, Federal agencies are not subject to the assessment of civil penalties. Federal law does include, however, ways to allege that a Federal agency has failed to comply with the requirements of the Act or the regulations (or any other Federal law or regulation). The most broadly applicable way to allege that a Federal agency has failed to comply is to send an allegation to the head of the appropriate Federal agency or to the Federal agency's Office of the Inspector General. Assuming that the alleged failure to comply is a final agency

action (see proposed §10.1(i)), the failure to comply could also be the subject of a lawsuit under the Administrative Procedure Act (5 U.S.C. 704).

#### 1. Broaden the Options for a Failure to Comply

The Department proposes to remove from the existing regulations at §10.12(b) the definition of “failure to comply.” Consistent with the Act, the proposed revisions would provide that a museum that fails to comply with any provision of the Act or Subpart C of the regulations has failed to comply. As under the existing regulations, each instance of failure to comply would constitute a separate violation. The proposed revisions include what factors would be relevant for determining the number of separate violations.

For example, if a museum fails to include information regarding the known presence of a potentially hazardous substance used to treat the human remains or associated funerary objects in an itemized list, the number of separate violations committed by the museum may be calculated by determining the number of lineal descendants, Indian Tribes, or NHOs named in an allegation and determined to be aggrieved by this failure to comply. Alternatively, if a museum completes the repatriation of human remains and associated funerary objects without submitting a notice of inventory completion, the number of separate violations may be calculated by determining the number of human remains and associated funerary objects involved in this failure to comply.

#### 2. Allowing for a Single Hearing to Contest

The Department proposes to consolidate the dual hearing process in the existing regulations—which involve an opportunity to contest both a substantiated failure to comply and a penalty assessment in separate hearings— into one single hearing. The bifurcated hearing process adopted in 2003 (68 FR 16354, April 3, 2003) is not legally required. The Act uses identical language (25 U.S.C. 3007(a)) to the Administrative Procedure Act (APA) (5 U.S.C. 554(a)). This reflects Congressional intent that civil

penalties be adjudicated under similar procedural requirements to the APA and not a unique approach. Numerous government agencies have complied with Section 554(a) by conducting single hearing adjudications, which have withstood legal challenges for procedural due process. Not only does the single hearing process satisfy the Administrative Procedure Act's identical procedural requirements (5 U.S.C. 554(a)), but it would also provide greater efficiencies for all parties and quicker resolution of cases.

### 3. Calculation of Base Penalty Amount

The Department proposes to change the calculation of the base penalty amount for each instance of failure to comply. Under the existing regulations, the base penalty amount for each separate violation is calculated as the lesser of two amounts: 0.25 percent of the museum's annual budget or \$7,475 (adjusted annually for inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74)). The proposed revision would require that the penalty amount be calculated using only \$7,475 (adjusted annually for inflation) as the base penalty amount.

The Act, the existing regulations, and the proposed revisions permit the Secretary to increase the penalty amount after considering different factors, including an aggrieved party's economic and non-economic damages. For example, economic damages could be an Indian Tribe's expenditures for an attorney or other staff to prepare, review, and file documents to compel the museum to comply. For another example, non-economic damages could be a traditional religious leader's inability to conduct a certain ceremony because of the museum's failure to comply.

In response to consultation with Indian Tribes and NHOs, the Department proposes to include an additional factor for increasing the penalty amount based on ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or NHO. The Secretary also may reduce the penalty amount if the museum agrees to mitigate the violation. For

example, mitigation could be a museum's payment to an NHO for the cost of a ceremony associated with the repatriation of human remains or cultural items, or the value of land that a museum provides for the reinterment of human remains and associated funerary objects. Another appropriate factor that may justify reducing a penalty would include the museum, through its chief executive, self-reporting the museum's failure to comply, by sending a written report of the violation to the Manager, National NAGPRA Program.

#### 4. Options Upon Receipt of Notice

The proposed revisions describe the actions a museum may take upon receipt of a notice of failure to comply and include the option for a museum to file a petition for relief in the existing regulations at §10.12(i)(3). The proposed revisions also describe the actions a museum may take upon receipt of a notice of assessment and include the option for a museum to request a hearing to contest the failure to comply or the penalty assessment in the existing regulations at §§10.12(f)(2) and (i)(4).

#### 5. Exhaustion of Administrative Remedies

The proposed revisions would require a museum to exhaust all administrative remedies under this section prior to seeking judicial review of the final administrative decision of the Secretary. This section would also make clear that no decision would be considered to constitute final agency action subject to judicial review during the time the decision is subject to review under this section of the regulations. The proposed revisions contain provisions that would allow for the assessment of an additional daily penalty amount of \$1,496 per day, subject to annual adjustments based on inflation, and would include the Department's options of instituting legal action to recover penalties and pursuing other available legal or administrative remedies.

Table 17 shows how the Department proposes to reorganize the existing regulatory requirements for the assessment of civil penalties on any museum that fails to comply with the requirements of the Act.

**Table 17: Cross-Reference of Existing Provisions to Proposed §10.11**

<b>Existing 43 CFR Section</b>		<b>Proposed 43 CFR Section</b>	
10.12(c)	How to notify the Secretary...	10.11(a)	File an allegation.
10.12(d)	Steps the Secretary may take...	10.11(b)	Respond to an allegation.
10.12(g)	How the Secretary determines the penalty amount.	10.11(c)	Calculate the penalty amount.
10.12(e)	How the Secretary notifies...	10.11(d)	Notify a museum of a failure to comply.
10.12(f)	Actions you may take upon receipt of a notice... (1) Seek informal discussions...	10.11(e)	Respond to a notice of failure to comply.
10.12(i)	Actions that you may take upon receipt of a notice... (1) Accept in writing... (3) File a petition for relief.		
10.12(h)	How the Secretary assesses the penalty...	10.11(f)	Assess the civil penalty.
10.12(h)	(3) The Secretary notifies you in writing...	10.11(g)	Notify the museum of an assessment.
10.12(i)	Actions that you may take upon receipt of a notice... (1) Accept in writing or by payment of the proposed penalty...	10.11(h)	Respond to an assessment.
10.12(f)	(2) Request a hearing...		(2) File a written request for a hearing to contest...
10.12(i)	(4) Request a hearing...		
10.12(j)	How you request a hearing	10.11(i)	Request a hearing.
		10.11(j)	Hearings.
10.12(k)	How you appeal a decision.	10.11(k)	Appealing the administrative law judge's decision.
10.12(l)	The final administrative decision.	10.11(l)	Exhaustion of administrative remedies.
10.12(g)	(3) An additional penalty of up to...	10.11(m)	Failure to pay penalty or continuing failure to comply. .
10.12(m)	(2) If you fail to pay the penalty...		
10.12(m)	(3) Assessing a penalty...	10.11(n)	Additional remedies.
10.12(a)	The Secretary's authority...		Removed.
10.12(b)	Definition of failure to comply.		
10.12(f)	(3) Take no action and await...		
10.12(i)	(2) Seek informal discussion with the Secretary (on the assessment)		
10.12(m)	(1) If you are assessed a civil penalty, you have...		

This section of the proposed rule would implement the requirements of the Act regarding the Federal Advisory Review Committee (25 U.S.C. 3006). The Department proposes to clarify the existing provisions at §§10.16 and 10.17 and add new provisions to clarify the responsibilities of the Review Committee.

1. Deadline for Publishing Findings or Recommendations.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add a requirement that recommendations made by the Review Committee will be published in the *Federal Register* within 90 days of the making the finding or recommendation. This is the same requirement under the Federal Advisory Committee Act (FACA) for completing minutes of the Review Committee meeting.

2. Add Requirements for Nominations to the Review Committee.

The Department proposes to add new provisions to clarify which entities may make nominations to the Secretary. Under the Act (25 U.S.C. 3006(b)(1)(A)), Congress explicitly identified who is eligible to nominate a person to three specified slots on the Review Committee and who is eligible to serve in two of those slots. Only Indian Tribes, NHOs, and “traditional Native American religious leaders” are eligible to be the nominators, and only “traditional Indian religious leaders” are eligible to serve in two of the three specified slots. When Congress expressly identified traditional Indian religious leaders as being eligible to serve in two of the three specified slots, it excluded traditional Native Hawaiian religious leaders.

Under the Act (25 U.S.C. 3006(b)(1)(B)), Congress did not provide any additional requirements for nominators beyond “national museum organizations and scientific organizations. The proposed addition seeks to clarify these requirements by defining what national museum organizations and national scientific organizations are, as recommended by the Government Accountability Office in a 2010 report on the implementation of the

Act. As many national organizations have an abundance of subsidiary organizations, the proposed addition requires nominations be submitted only through a parent organization.

### 3. Add Definitions and Provisions for Findings of Fact or Disputes.

The proposed revisions describe the finding of fact or dispute function of the Review Committee and remove the references in the existing regulations to informal and formal dispute resolution. The proposed definition of “an affected party” was drawn from the Review Committee’s Dispute Procedures. The proposed revisions seek to clarify the distinction between findings of fact and disputes as well as to provide the options for the Review Committee’s recommendation.

Table 18 shows how the Department proposes to reorganize the existing regulatory requirements for the Review Committee.

**Table 18: Cross-Reference of Existing Provisions to Proposed §10.12**

Existing 43 CFR Section		Proposed 43 CFR Section	
10.16(b)	Recommendations.	10.12(a)	Recommendations.
	New	10.12(b)	Nominations.
10.17	Dispute resolutions.	10.12(c)	Findings of fact or disputes on repatriation.

## VI. Public Engagement and Request for Comments

### A. Public Engagement

The Department will conduct consultation sessions with Indian Tribes virtually during the comment period. The Department will announce the exact meeting dates and times of the consultation sessions, once scheduled, on <https://www.doi.gov/priorities/tribal-consultation/upcoming-tribal-consultations> and by letter to Tribal leaders. The Department will also conduct consultation sessions with the Native Hawaiian Community virtually during the comment period. The Department of the Interior’s Office of Native Hawaiian Relations will invite the Native Hawaiian Community to participate and provide the exact meeting dates and times of the



consultation sessions, once scheduled. Upon request, the Department will consider additional consultation sessions with Indian Tribes or the Native Hawaiian Community to ensure sufficient opportunity to engage and comment in advance of a final rule and to respond to the previous requests received for additional consultation sessions.

One goal of the proposed regulatory revisions is to provide specific timelines for museums and Federal agencies to facilitate the required repatriation. The Department does not intend to impose timeframes on lineal descendants, Indian Tribes, or NHOs to request disposition or repatriation. The Department requests feedback from Indian Tribes and NHOs on whether this goal has been achieved and how to further allow Indian Tribes and NHOs flexibility and discretion with regard to the proposed regulatory revisions and, in particular, the new responsibilities under Subpart B and the proposed deadlines under Subpart C.

The Department will also proactively contact and consult with a subset of smaller Indian Tribes and NHOs to ensure that they anticipate sufficient opportunity under the proposed regulatory changes in Subpart C to submit requests for repatriation of the human remains or cultural items anticipated to become available within three years of a final rule. Specifically, Indian Tribes and NHOs are currently responsible for submitting a request to consult, consulting, submitting a request for repatriation, and, in some cases, requesting transfer of human remains or cultural items. Under the proposed regulations, Indian Tribes and NHOs have the same responsibilities, but are likely to increase the number of annual responses for each responsibility, especially in submitting requests for repatriation. As stated in §10.1(g), failure to make a claim for disposition or a request for repatriation of human remains or cultural items is deemed an irrevocable waiver of any right to make a claim or a request.

The Department will also proactively contact and consult with Indian Tribes and NHOs to ensure that they anticipate sufficient opportunity under the proposed regulatory

changes to take on new responsibilities under Subpart B. Specifically, Indian Tribes and NHOs are currently responsible for responding to a discovery on their Tribal lands, consenting to an excavation on Tribal lands, and submitting a claim for disposition on Federal lands. Under the proposed regulations, Indian Tribes and NHOs will also be responsible for delegating or accepting responsibilities on Tribal lands, submitting a request to consult on Federal lands, sending or completing a disposition statement on Tribal lands, and requesting transfer of unclaimed human remains or cultural items on Federal lands.

Another goal of the proposed regulatory revisions is to improve efficiency in meeting the requirements of the systematic process for repatriation under Subpart C. The Department requests feedback from Indian Tribes, NHOs, museums, and Federal agencies on whether this goal has been achieved and how to ensure the step-by-step process for repatriation is streamlined and simplified by the proposed regulatory revisions under Subpart C.

The Department will proactively contact and engage with a subset of affected entities, which will include Indian Tribes, NHOs, museums, and Federal agencies, during the comment period to understand if the proposed regulatory revisions could impact these entities' capacity and resources. Under the proposed regulatory revisions, museums and Federal agencies would be required to update inventories for any human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion within two years of a final rule. Based on information available to it, a museum or Federal agency would be required to initiate consultation, consult with requesting parties, and determine if there is a known lineal descendant or a cultural or geographical affiliation. Museums would also be able to request extensions to update an inventory if it has made a good faith effort but will be unable to do so by the appropriate deadline. Indian Tribes and NHOs would be required to submit requests to

consult and engage in consultation. Museums and Federal agencies would also be required to publish notices of inventory completion within six months of updating the inventory.

In particular, the Department anticipates that the human remains of 117,000 Native American individuals currently unable to be repatriated would become available for repatriation within two and a half years of the effective date of a final rule, a substantial increase from the 84,000 individuals repatriated in the almost 32 years since the passage of NAGPRA. At this time, the Department is not aware of any capacity and resource limitations that would prevent these entities from completing the new requirement to update inventories, submit requests to consult, engage in consultation, and publish notices following the effective date of a final rule.

#### B. Requests for Comments

In addition to the public engagement and outreach discussed above, the Department solicits comment from the public on the entirety of this proposed rule. The Department is interested in receiving comments from the public on the cost-benefit and regulatory flexibility analyses, including the conclusions about the expected costs of complying with the proposed rule. In particular, the Department is interested in responses to the following questions:

a. For each regulatory requirement, does the estimated time per response seem reasonable? If not, what range of time per response would be more reasonable for a specific regulatory requirement? For example, Federal agencies and museums are required to initiate and conduct consultation under both the existing regulations and the proposed regulations. We estimate the time per response ranges from ten hours to 300 hours, depending on the size and complexity of the consultation, for a median of 155 hours.

b. For Subpart B, is the estimated number of annual discoveries on Federal or Tribal lands reasonable? We used the average number of notices on Federal lands over the last three years, but we have no data on the number of discoveries on Tribal lands to inform this estimate.

c. For Subpart C, is the estimated number of museums and Federal agencies required to update inventory data under the proposed regulations reasonable? We estimate 414 museums and 19 Federal agencies will be required to update inventories within three years after promulgation of a final rule. We estimate that 33% of those museums and Federal agencies will submit inventory updates each year for three years. We assume fewer inventory records will require less time to update. We assume museums previously prepared and submitted inventories in accordance with the existing regulations and an update to that inventory requires less time than submission of a new inventory. We estimate the time per response will range from less than one hour to 100 hours, depending on the size and complexity of the update, for a median of 50.25 hours.

d. For Subpart C, many museums and Federal agencies update inventories at their own discretion, going beyond what is required by the Act and the existing regulations, which only requires use of “information possessed by such museum or Federal agency” (25 U.S.C. 3003(a)). Given the potential expense of more extensive studies not required by the Act or the revised regulations, how should the Department account for these costs in this rulemaking? We also request public data about the potential costs of updating inventories under the revised regulations.

e. For Subpart C, is the estimated number of museums required to report on Federal holdings or collections reasonable? We estimate the number of museums required to submit statements is 5% of all museums that previously submitted information under the existing regulations.

f. Is the estimated number of competing claims for disposition or competing requests for repatriation reasonable?

g. Using data on implementation since 2012, we estimate it will take an additional 26 years to complete the consultation and notification process for all 117,000 Native American human remains currently pending in the existing regulatory framework. Is this 26-year time horizon reasonable? Will the proposed regulatory requirements result in a change in consultation activities per year, and if so, how should the Department account for the change in costs to Indian Tribes or NHOs for engaging in consultation?

#### C. Use of Received Feedback

The Department will use all received feedback to inform a final rule and may make changes to a final rule based on received feedback that is within the scope of this proposed rule.

### **VII. Compliance with Other Laws, Executive Orders and Department Policy**

#### A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant regulatory actions. OIRA has determined that this rule is a significant regulatory action.

Executive Order 13563 reaffirms the principles of Executive 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public

participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Executive Order 13985).

This proposed rule is expected to advance racial equity in agency actions and programs, in accordance with the Executive Order 13985.

C. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on the cost-benefit and regulatory flexibility analyses found in the report entitled “Benefit-Cost and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Regulations” that may be viewed online at on <https://www.regulations.gov>.

D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.
- b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions.
- c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments, or the private

sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

F. Takings (Executive Order 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

G. Federalism (Executive Order 13132)

Under the criteria in Section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

H. Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of §3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of §3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

I. Consultation with Indian Tribes (Executive Order 13175 and Department Policy)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified direct Tribal implications. Accordingly, we have developed this proposed rule after consulting with federally recognized Indian Tribes as detailed in this preamble. In addition, we developed this proposed rule in consultation

with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by Indian Tribes.

J. Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*)

1. Overview

The Paperwork Reduction Act (PRA) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a “collection of information,” unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)). These proposed regulations contain existing and new information collection requirements that are subject to review by OMB under the PRA. OMB previously reviewed and approved information collection related to 43 CFR part 10 and assigned the following OMB control number 1024-0144 (expires 4/30/2025).

The information collection activities in this proposed rule are described below along with estimates of the annual burdens. These activities, along with annual burden estimates, do not include activities that are considered usual and customary industry practices. Included in the burden estimates are the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each component of the proposed information collection requirements.

The Department of the Interior requests comment on any aspect of this information collection, including:

- a. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- b. The accuracy of the estimate of the burden for this collection of information,



including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

## 2. Summary of Proposed Information Collection Requirements

*Title of Collection:* Native American Graves Protection and Repatriation Regulations.

*OMB Control Number:* 1024-0144.

*Form Number:* None.

*Type of Review:* Revision of a currently approved collection.

*Respondents/Affected Public:* Any person, any affected party, lineal descendants, Indian Tribes, Native Hawaiian organizations, and State and local governments, universities, and museums, that receive Federal funds and have possession or control of Native American human remains and cultural items.

*Respondent's Obligation:* Mandatory, voluntary, and required to obtain or retain a benefit.

*Frequency of Collection:* On occasion.

*Total Estimated Number of Annual Responses:* 2,212

*Estimated Completion Time per Response:* Varies from 1 hour to 300 hours depending on respondent and/or activity.

*Total Estimated Number of Annual Burden Hours:* 35,878.

*Total Estimated Annual Non hour Burden Cost:* None.

*Summary by Subpart of the proposed regulations*

Subpart	Information Collections	Respondents
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Subpart A – General	0	None.
Subpart B – Protection of Human Remains or Cultural Items on Federal or Tribal Lands	1 5	Any person Indian Tribes or NHOs
Subpart C – Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies	1 1 1 16	Any person Indian Tribes or NHOs Lineal descendants Museums
Subpart D – Review Committee	1	Any affected party

Subpart A – General does not contain any information collection requirements subject to the PRA. References to written documents in this Subpart refer to the specific information collection requirements in the three subparts below.

Subpart B – Protection of Human Remains or Cultural Items on Federal or Tribal Lands contains six information collection requirements subject to the PRA. On Federal or Tribal lands, any person who knows or has reason to know of the discovery of human remains or cultural items must provide specified information to third parties. On Federal lands, an Indian Tribe or NHO may submit a claim for disposition by disclosing specified information to third parties. On Tribal lands, an Indian Tribe or NHO must maintain specified records and in one instance, disclose specified information to third parties.

Subpart C – Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies contains 19 information collection requirements subject to the PRA. State and local governments, universities, and museums that receive Federal funds and have possession or control of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony must submit information to the Federal government, maintain specified records, and disclose specified information to third parties. Lineal descendants, Indian Tribes, or NHOs may submit a request for repatriation by disclosing specified information to third parties. Any person alleging a failure to comply may voluntarily submit information to the Federal government. Museums may respond to a civil penalty action by submitting information to the Federal government.

In the proposed regulations, Subpart D – Review Committee contains one information collection requirements subject to the PRA. Any affected party may voluntarily submit information to the Federal government.

#### **Proposed new information collection requirements in Subpart B**

<b>Information Collection Requirement</b>	<b>Proposed Rule</b>
Report a discovery on Federal or Tribal lands	§10.5(a)-(b)
Respond to a discovery	§10.5(c)(1) and §10.5(e)
Consent to an excavation	§10.6(a)
Submit a claim for disposition	§10.7(d)(3)
Delegate or accept responsibility on Tribal land	§10.5(c)(2)-(3); §10.6(a)(2)-(3) and §10.7(c)(2)-(3)
Send or complete a disposition statement	§10.7(b) and §10.7(c)

#### **Currently approved information collections requirements in Subpart C**

<b>Information Collection Requirement</b>	<b>Proposed Rule</b>
New Summary/ Inventory (private and state or local museums)	§10.9(a) and §10.10(d)
Updated Summary/ Inventory Data (private and state or local museums)	§10.9(a) and §10.10(d)
Notices for publication in the <i>Federal Register</i> (private and state or local museums)	§10.9(f) and §10.10(e)
Initiate Consultation and Request Information (private and state or local museums) (previously Notify Tribes)	§10.10(b)-(c)
Response to requests for information (state or local museums)	Removed

#### **Proposed new information collection requirements in Subpart C**

<b>Information Collection Requirement</b>	<b>Proposed Rule</b>
Conduct consultation	§10.9(c) and §10.10(c)
Submit a request for repatriation	§10.9(d) and §10.10(f)
Document physical transfer	§10.9(g)(2) and §10.10(h)(2)
File an allegation of failure to comply	§10.11(a)
Respond to a civil penalty action	§10.11(e), (h), (i), and (k)
Submit statements describing holdings or collection	§10.8(c)-(d)
Make a record of consultation	§10.9(c)(3) and §10.10(c)(3)
Respond to a request for repatriation	§10.9(e) and §10.10(g)
Send a repatriation statement	§10.9(g) and §10.10(h)
Evaluate competing requests and resolve stays of repatriation	§10.9(h)-(i) and §10.10(i)-(j)
Transfer or reinter human remains and associated funerary objects	§10.10(k)

#### **Proposed new information collection requirements in Subpart D**

<b>Information Collection Requirement</b>	<b>Proposed Rule</b>
Request assistance of the Review Committee	§10.12(c)

3. Information that is not an information collection subject to the PRA.

Lineal descendants, Indian Tribes, and Native Hawaiian organizations may take certain actions that are not information collections subject to the PRA. Written documents requesting to consult are acknowledgements that entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the consultation.

Federal agencies and the Department of Hawaiian Home Lands (DHHL) must take certain actions that are not information collections subject to the PRA. The Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law (see 81 FR 29777 and 29787, May 13, 2016, 43 CFR 47 and 48, Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920). These written documents are required by employees of the Federal government or DHHL when acting within the scope of their employment.

Indian Tribes, Native Hawaiian organizations, and Indian groups that are not federally recognized may take certain actions to request transfer of human remains or cultural items that are not information collections subject to the PRA. These actions impact fewer than ten persons and occur less often than annually.

Indian Tribes, Native Hawaiian organizations, traditional religious leaders, national museum organizations, and national scientific organizations may take certain actions that are not information collections subject to the PRA. These actions are generally solicited through a notice in the *Federal Register*, impact fewer than ten persons, and occur less often than annually.

#### 4. Burden Estimates

The Department has identified 26 information collections in the proposed regulations. In total, we estimate that we will receive, annually, 2,212 responses totaling

35,878 annual hour burden. We estimate the annual dollar value is \$2,304,481 (rounded). We estimate the frequency of response for each of the information collections is once per year, but the number of respondents may not be the same as the number of responses, depending on the type of information collected. In our estimate, we have only used the number of responses to simplify our estimate and remain consistent across the types of information collected. For some information collections, the time per response varies widely because of differences in activity, size, and complexity.

#### 5. Written Comments or Additional Information

Written comments and suggestions on the information collection requirements should be submitted by the date specified above in DATES to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR-ICCO), 12201 Sunrise Valley Drive, (MS-242) Reston, VA 20191 (mail); or [phadrea\\_ponds@nps.gov](mailto:phadrea_ponds@nps.gov) (email). Please include OMB Control Number 1024-0144 in the subject line of your comments.

To request additional information about this ICR, contact Melanie O'Brien, Manager, National NAGPRA Program by email at [melanie\\_o'brien@nps.gov](mailto:melanie_o'brien@nps.gov), or by telephone at (202) 354-2204. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <https://www.reginfo.gov/public/do/PRAMain>.

#### K. National Environmental Policy Act (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by a categorical exclusion under 43 CFR 46.210(i): “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

#### L. Effects on the Energy Supply (Executive Order 13211)

This rulemaking is not a significant energy action under the definition in Executive Order 13211; the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects is not required.

#### M. Clarity of This Rule

We are required by Executive Orders 12866 (§1(b)(12)) and 13563 (§1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language.

This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and enter RIN 1024-AE19 in the search box.

#### **Drafting Information**

This proposed rule was prepared by staff of the National NAGPRA Program, National Park Service; Office of Regulations and Special Park Uses, National Park Service; Office of Native Hawaiian Relations; Office of Regulatory Affairs & Collaborative Action, Office of the Assistant Secretary – Indian Affairs; and Office of the Solicitor, Division of Parks and Wildlife and Division of Indian Affairs, Department of the Interior. This proposed rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee under the Act (25 U.S.C. 3006(c)(7)).

#### **List of Subjects in 43 CFR Part 10**

Administrative practice and procedure, Alaska, Cemeteries, Citizenship and naturalization, Colleges and universities, Hawaiian Natives, Historic preservation,

Human remains, Indians, Indians-claims, Indians-law, Indians-lands, Museums, Penalties, Public lands, Reporting and recordkeeping requirements, Treaties.

In consideration of the foregoing, the Department of the Interior proposes to revise 43 CFR Part 10 as follows:

## **PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS**

### **Subpart A—GENERAL**

Sec.

10.1 Introduction.

10.2 Definitions for this part.

10.3 Cultural and geographical affiliation.

### **Subpart B—PROTECTION OF HUMAN REMAINS OR CULTURAL ITEMS ON FEDERAL OR TRIBAL LANDS**

10.4 General.

10.5 Discovery.

10.6 Excavation.

10.7 Disposition.

### **Subpart C—REPATRIATION OF HUMAN REMAINS OR CULTURAL ITEMS BY MUSEUMS OR FEDERAL AGENCIES**

10.8 General.

10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

10.10 Repatriation of human remains and associated funerary objects.

10.11 Civil penalties.

### **Subpart D—REVIEW COMMITTEE**

10.12 Review Committee.

**Authority:** 25 U.S.C. 3001 *et seq.* and 25 U.S.C. 9.

### **Subpart A—GENERAL**

#### **§ 10.1 Introduction.**

(a) *Purpose.* These regulations provide a systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony under the Native American Graves Protection and Repatriation Act (Act) of November 16, 1990. The Act recognized the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American



human remains or cultural items subject to this part. Consistent with the Act's express language and Congress's intent in enacting the statute, these regulations require museums and Federal agencies to complete timely dispositions and repatriations through consultation and collaboration with lineal descendants, Indian Tribes, and Native Hawaiian organizations. In implementing this systematic process, museums and Federal agencies must defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

(b) *Applicability.* These regulations pertain to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony and require certain actions to:

(1) Protect Human Remains or Cultural Items on Federal or Tribal Lands in the event of a discovery or excavation after November 16, 1990; and

(2) Repatriate Human Remains or Cultural Items in the possession or control of:

(i) Any Federal agency, regardless of the physical location of the holding or collection; or

(ii) Any institution or State or local government agency (including any institution of higher learning) within the United States that receives Federal funds, regardless of the physical location of the holding or collection.

(c) *Accountability.* These regulations are applicable to and binding on all museums and Federal agencies for implementing the systematic process for the disposition and repatriation of human remains or cultural items under this part.

(d) *Duty of care.* Prior to disposition or repatriation, these regulations require a museum or Federal agency to care for, safeguard, and preserve all human remains or cultural items in its custody or in its possession or control. Upon request of a lineal descendant, Indian Tribe, or Native Hawaiian organization, a museum or Federal agency must, to the maximum extent possible:

(1) Consult, collaborate, and obtain consent on the appropriate treatment, care, or handling of human remains or cultural items;

(2) Incorporate and accommodate customs, traditions, and Native American traditional knowledge in practices or treatments of human remains or cultural items; and

(3) Limit access to and research on human remains or cultural items.

(e) *Delivery of written documents.* These regulations require written documents to be sent or delivered, such as requests for repatriation, claims for disposition, invitations or requests to consult, or notices for publication.

(1) The written documents must be sent by:

(i) Email, with proof of receipt,

(ii) Personal delivery with proof of delivery date,

(iii) Private delivery service with proof of date sent, or

(iv) Certified mail.

(2) Communication to the Manager, National NAGPRA Program, should be sent electronically to [nagpra\\_info@nps.gov](mailto:nagpra_info@nps.gov). If electronic submission is not possible, physical delivery may be sent to 1849 C Street NW, Mail Stop 7360, Washington, DC 20240. If either of these addresses change, a notice with the new address must be published in the *Federal Register* within 5 days of the change.

(f) *Deadlines and timelines.* These regulations require certain actions be taken by a specific date. Unless stated otherwise in these regulations:

(1) Days mean business days, i.e., Monday through Friday. For any action by an Indian Tribe, Native Hawaiian organization, Federal agency, or the Manager, National NAGPRA Program, business days do not include days during which the Federal government is closed because of a Federal holiday, lapse in appropriations, or other reasons.

(2) Written documents are deemed timely based on the date sent, not the date received.

(3) Parties sending or receiving written documents under these regulations must document the date sent or date received, as appropriate, when these regulations require those parties to act based on the date sent or date received.

(g) *Failure to make a claim or a request.* Failure to make a claim for disposition or a request for repatriation before the disposition, repatriation, transfer, or reinterment of human remains or cultural items under this part is deemed an irrevocable waiver of any right to make a claim or a request for the human remains or cultural items once the disposition, repatriation, transfer, or reinterment of the human remains or cultural items has occurred.

(h) *Judicial jurisdiction.* The United States district courts have jurisdiction over any action by any person alleging a violation of the Act or this part.

(i) *Final agency action.* For purposes of the Administrative Procedure Act (5 U.S.C. 704), any of the following actions by a Federal agency constitutes a final agency action under this part:

- (1) A final determination making the Act or this part inapplicable;
- (2) A final denial of a claim for disposition or a request for repatriation; and
- (3) A final disposition or repatriation determination.

(j) *Information collection.* The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1024-0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, the collection of information under this part unless the Federal agency provides a currently valid OMB control number.

## **§ 10.2 Definitions for this part.**

*Act* means the Native American Graves Protection and Repatriation Act.

*Acknowledged aboriginal land* means land whose occupation by an Indian Tribe has been recognized in any of the following sources:

- (1) A treaty sent by the President to the United States Senate for ratification;
- (2) An Act passed by Congress;
- (3) An Executive Order;
- (4) A treaty between a foreign or colonial government and an Indian Tribe signed before the establishment of the United States Government or prior to the land becoming incorporated in the United States;
- (5) Another Federal document or foreign government document providing information that reasonably shows aboriginal occupation; or
- (6) Intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes.

*Adjudicated aboriginal land* means land whose occupation by an Indian Tribe has been recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims. A final judgment also includes a judgment concerning a settlement as long as that judgment or settlement either explicitly recognizes certain land as the aboriginal land of an Indian Tribe or adopts findings of fact that do so.

*Affiliation* means a connection between human remains or cultural items and an Indian Tribe or Native Hawaiian organization.

*Ahupua'a* (singular and plural) means a land division in Hawai'i usually extending from the uplands to the sea which traditionally was, and in some cases remains, self-sustaining or whose occupants were or are permitted access to or trade resources with the neighboring ahupua'a.

*Appropriate official* means any representative authorized by a delegation of authority within an Indian Tribe, Native Hawaiian organization, Federal agency, or

Department of Hawaiian Home Lands (DHHL) that has responsibility for human remains or cultural items on Federal or Tribal lands.

*ARPA* means the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa-mm) and the relevant Federal agency regulations implementing that statute.

*ARPA Indian lands* means lands of Indian Tribes, or individual Indians, which are either held in trust by the United States Government or subject to a restriction against alienation imposed by the United States Government, except for any subsurface interests in lands not owned or controlled by an Indian Tribe or an individual Indian.

*ARPA Public lands* means lands owned and administered by the United States Government as part of:

- (1) The national park system,
- (2) The national wildlife refuge system,
- (3) The national forest system, and
- (4) All other lands the fee title to which is held by the United States Government, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

*Consultation* means a process to seek consensus through the exchange of information, open discussion, and joint deliberations and by incorporating identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.

*Cultural items* means a funerary object, sacred object, or object of cultural patrimony according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge.

*Custody* means having an obligation to care for the object or item but not a sufficient interest in the object or item to constitute possession or control. In general,

custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

*Discovery* means exposing, finding, or removing human remains or cultural items whether intentionally or inadvertently on Federal or Tribal lands without a written authorization for an excavation under §10.6.

*Disposition* means an appropriate official acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items removed from Federal or Tribal lands.

*Excavation* means intentionally exposing, finding, or removing human remains or cultural items on Federal or Tribal lands with a written authorization under §10.6.

*Federal agency* means any department, agency, or instrumentality of the United States Government. This term does not include the Smithsonian Institution.

*Federal lands* means any lands other than Tribal lands that is controlled or owned by the United States Government. For purposes of this definition, control refers to lands not owned by the United States Government, but in which the United States Government has a sufficient legal interest to permit it to apply these regulations without abrogating a person's existing legal rights. Whether the United States Government has a sufficient legal interest to control lands it does not own is a legal determination that a Federal agency must make on a case-by-case basis. Federal lands include:

(1) Any lands selected by, but not yet conveyed to, an Alaska Native Corporation or group organized under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*);

(2) Any lands other than Tribal lands that are held by the United States Government in trust for an individual Indian or lands owned by an individual Indian and subject to a restriction on alienation by the United States Government; and

(3) Any lands subject to a statutory restriction, lease, easement, agreement, or similar arrangement containing terms that grant to the United States Government indicia of control over those lands.

*Funerary object* means any object reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. This term does not include any object returned or distributed to living persons according to traditional custom after it has been displayed as part of a death rite or ceremony of a Native American culture. Funerary objects are either associated funerary objects or unassociated funerary objects.

(1) *Associated funerary object* means the human remains related to the funerary object are, or were after November 16, 1990, in the possession or control of any museum or Federal agency or removed from Federal or Tribal lands. Any object made exclusively for burial purposes or to contain human remains is always an associated funerary object regardless of the location or existence of any related human remains.

(2) *Unassociated funerary object* means any funerary object that is not an associated funerary object and is identified by a preponderance of the evidence as one or more of the following:

(i) Related to human remains but the human remains were not removed or the location of the human remain is unknown,

(ii) Related to specific individuals or families,

(iii) Removed from a specific burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization, or

(iv) Removed from a specific area where a burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization is known to have existed, but the burial site is no longer extant.

*Holding or collection* means an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including:

- (1) Academic interest;
- (2) Accession;
- (3) Catalog;
- (4) Comparison;
- (5) Conservation;
- (6) Education;
- (7) Examination;
- (8) Exhibition;
- (9) Forensic purposes;
- (10) Interpretation;
- (11) Preservation;
- (12) Public benefit;
- (13) Research;
- (14) Scientific interest; or
- (15) Study.

*Human remains* means the physical remains of the body of a Native American individual. This term does not include human remains or portions of human remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained. When human remains are reasonably believed to be comingled with other material (such as soil or faunal remains), the entire admixture may be treated as human remains.



(1) Human remains incorporated into a funerary object, sacred object, or object of cultural patrimony are considered part of the cultural item rather than human remains.

(2) Human remains incorporated into an object or item that is not a funerary object, sacred object, or object of cultural patrimony are considered human remains.

*Indian Tribe* means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary under the Act of November 2, 1994 (25 U.S.C. 5131).

*Inventory* means a simple itemized list of human remains and associated funerary objects in a holding or collection that includes the results of consultation and determinations about cultural and geographical affiliation.

*Lineal descendant* means:

(1) A living person tracing his or her ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to this part; or

(2) A living person tracing his or her ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to all the known individuals represented by comingled human remains (example: the human remains of two individuals have been comingled, and a living person may trace his or her ancestry directly to both of the deceased individuals).

*Manager, National NAGPRA Program*, means the official of the Department of the Interior designated by the Secretary as responsible for administration of the Act and this part.

*Museum* means any institution or State or local government agency (including any institution of higher learning) that has possession or control of human remains or cultural items and receives Federal funds. The term does not include the Smithsonian Institution.

*Native American* means of, or relating to, a tribe, people, or culture that is indigenous to the United States. To be considered Native American under this part, human remains or cultural items must bear some relationship to a tribe, people, or culture indigenous to the United States.

(1) A tribe is an Indian Tribe.

(2) A people comprise the entire body of persons who constitute a community, tribe, nation, or other group by virtue of a common culture, history, religion, language, race, ethnicity, or similar feature. The Native Hawaiian Community is a “people.”

(3) A culture comprises the characteristic features of everyday existence shared by people in a place or time.

*Native American traditional knowledge* means knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by Native Americans. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed, sustained, and passed through time, often forming part of a cultural or spiritual identity.

*Native Hawaiian organization* means any organization that:

(1) Serves and represents the interests of Native Hawaiians, who are descendants of the indigenous people who, before 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i;

(2) Has as a primary and stated purpose the provision of services to Native Hawaiians; and

(3) Has expertise in Native Hawaiian affairs, and includes but is not limited to:

(i) The Office of Hawaiian Affairs established by the constitution of the State of Hawai‘i;

(ii) Native Hawaiian organizations (including ‘ohana) who are registered with the Secretary’s Office of Native Hawaiian Relations; and

(iii) Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations as defined under 43 CFR 47.10.

*Object of cultural patrimony* means an object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group (such as a band, clan, lineage, ceremonial society, or other subdivision), according to an Indian Tribe or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. An object of cultural patrimony may have been entrusted to a caretaker, along with the authority to confer that responsibility to another caretaker. The object must be reasonably identified as being of such importance central to the group that it:

(1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and

(2) Must have been considered inalienable by the group at the time the object was separated from the group.

‘*Ohana* (family) means a group of people who are not lineal descendants but comprise a Native Hawaiian organization whose members have a familial or kinship relationship with each other.

*Person* means:

(1) An individual, partnership, corporation, trust, institution, association, or any other private entity; or

(2) Any representative, official, employee, agent, department, or instrumentality of the United States Government or of any Indian Tribe or Native Hawaiian organization, or of any State or subdivision of a State.

*Possession or control* means having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item. A museum or Federal agency may have possession or control regardless of whether the object or item is in its physical custody. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

*Receives Federal funds* means an institution or agency of a State or local government (including an institution of higher learning) directly or indirectly receives Federal financial assistance after November 16, 1990, including any grant; cooperative agreement; loan; contract; use of Federal facilities, property, or services; or other arrangement involving the transfer of anything of value for a public purpose authorized by a law of the United States Government. This term includes Federal financial assistance provided for any purpose that is received by a larger entity of which the institution or agency is a part. For example, if an institution or agency is a part of a State or local government or a private university, and the State or local government or private university receives Federal financial assistance for any purpose, then the institution or

agency receives Federal funds for the purpose of these regulations. This term does not include procurement of property or services by and for the direct benefit or use of the United States Government or Federal payments that are compensatory.

*Repatriation* means a museum or Federal agency acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items in a holding or collection.

*Review Committee* means the advisory committee established under the Act.

*Right of possession* means possession or control obtained with the voluntary consent of a person or group that had authority of alienation. Right of possession is given through the original acquisition of:

(1) An unassociated funerary object, a sacred object, or an object of cultural patrimony from an Indian Tribe or Native Hawaiian organization with the voluntary consent of a person or group with authority to alienate the object; or

(2) Human remains and associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or, when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization.

*Sacred object* means an object that is a specific ceremonial object needed by a traditional religious leader for the practice of traditional Native American religion by present-day adherents, according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. While many items might be imbued with sacredness in a culture, this term is specifically limited to objects needed for the observance or renewal of Native American religious ceremonies.

*Secretary* means the Secretary of the Interior or a designee.

*Summary* means a written description of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony.

*Traditional religious leader* means a person who, based on cultural, ceremonial, or religious practices, is considered by an Indian Tribe or Native Hawaiian organization as being responsible for performing cultural ceremonies or exercising a leadership role.

*Tribal lands* means:

(1) All lands that are within the exterior boundaries of any Indian reservation;

(2) All lands that are dependent Indian communities; and

(3) All lands administered by the Department of Hawaiian Home Lands (DHHL) under the Hawaiian Homes Commission Act of 1920 (HHCA, 42 Stat. 108) and Section 4 of the Act to Provide for the Admission of the State of Hawai‘i into the Union (73 Stat. 4), including “available lands” and “Hawaiian home lands.”

*Tribal lands of an NHO* means Tribal lands in Hawai‘i that are under the stewardship of a Native Hawaiian organization that has been issued a lease or license under HHCA section 204(a)(2), second paragraph, second proviso, or section 207(c)(1)(B).

*Unclaimed human remains or cultural items* means human remains or cultural items removed from Federal lands in the United States or from Tribal lands in Hawai‘i whose disposition has not occurred under this part.

*United States* means the 50 States and the District of Columbia.

### **§ 10.3 Cultural and Geographical Affiliation**

Throughout this part, affiliation ensures that disposition or repatriation of human remains or cultural items is based on a reasonable connection to an Indian Tribe or Native Hawaiian organization. Affiliation is established by identifying the cultural and geographical affiliation of the human remains or cultural items using this section.

(a) *Cultural affiliation*. Cultural affiliation is identified by reasonably tracing a relationship of shared group identity between an Indian Tribe or Native Hawaiian organization and an identifiable earlier group connected to the human remains or cultural items. Cultural affiliation is established by a simple preponderance of the evidence given the information available, including the results of consultation. Cultural affiliation does not require exhaustive studies of the human remains or cultural items or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information.

(1) Information. One or more of the following equally relevant types of information may be used to identify cultural affiliation:

- (i) Anthropological;
- (ii) Archaeological;
- (iii) Biological;
- (iv) Folkloric;
- (v) Geographical;
- (vi) Historical;
- (vii) Kinship;
- (viii) Linguistic;
- (ix) Oral Traditional; or

(x) Other relevant information or expert opinion, including Native American traditional knowledge which alone may be sufficient to identify cultural affiliation.

(2) Criteria. Using the information available, each of the following criteria for cultural affiliation must be identified:

- (i) One or more earlier groups connected to the human remains or cultural items;
- (ii) One or more Indian Tribes or Native Hawaiian organizations; and

(iii) A relationship of shared group identity between the earlier group and the Indian Tribe or Native Hawaiian organization reasonably traced through time.

(3) Multiple cultural affiliations. An identifiable earlier group may have a relationship to more than one Indian Tribe or Native Hawaiian organization. As two or more earlier groups may be connected to human remains or cultural items, a relationship may be reasonably traced to two or more Indian Tribes or Native Hawaiian organizations that do not themselves have a shared group identity.

(b) *Geographical affiliation.* Geographical affiliation is identified by reasonably tracing a relationship between an Indian Tribe or Native Hawaiian organization and a geographic area connected to the human remains or cultural items. Geographical affiliation is established by the information available, including the results of consultation.

(1) Information. Existing records, inventories, catalogues, relevant studies, or other pertinent data may be used to identify the:

- (i) Geographic origin of the human remains or cultural items and
- (ii) Basic facts surrounding the acquisition and accession of the human remains or cultural items.

(2) Criteria. Using the information available, each of the following criteria for geographical affiliation must be identified:

- (i) A geographic area connected to the human remains or cultural items;
- (ii) One or more Indian Tribes or Native Hawaiian organizations; and
- (iii) A relationship between the geographic area and the Indian Tribe or Native Hawaiian organization, based on the identification of the geographic area as:
  - (A) The Tribal lands of the Indian Tribe or Native Hawaiian organization,
  - (B) The adjudicated aboriginal land of the Indian Tribe, or
  - (C) The acknowledged aboriginal land of the Indian Tribe.



(3) Multiple geographical affiliations. A geographic area may have a relationship to more than one Indian Tribe or Native Hawaiian organization. Information used for geographical affiliation may provide information sufficient to identify cultural affiliation under paragraph (a) of this section but must not be used to limit geographical affiliation.

(c) *Multiple affiliations.* When affiliation of human remains or cultural items is established with two or more Indian Tribes or Native Hawaiian organizations, any of the Indian Tribes or Native Hawaiian organizations may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes or Native Hawaiian organizations with affiliation may agree to joint disposition or joint repatriation of the human remains or cultural items.

(1) Single claims or requests. Claims or requests for joint disposition or joint repatriation of human remains or cultural items are considered a single claim or request and not competing claims or requests. Notices and statements for joint disposition or joint repatriation of human remains or cultural items required under this part must identify all joint requestors.

(2) Competing claims or requests. Under §§10.7, 10.9, and 10.10, when there are competing claims for disposition or competing requests for repatriation of human remains or cultural items, it may be necessary to determine the Indian Tribe or Native Hawaiian organization with the closest affiliation under paragraph (d) of this section.

(d) *Closest affiliation.* (1) The Indian Tribe with the closest affiliation, in the following order, is:

(i) The Indian Tribe whose cultural affiliation is clearly identified.

(ii) The Indian Tribe whose cultural affiliation is not clearly identified but is reasonably identified by the information available, including the circumstances surrounding the acquisition of the human remains or cultural items.

(iii) The Indian Tribe whose geographical affiliation is based on the Tribal lands of the Indian Tribe.

(iv) The Indian Tribe whose geographical affiliation is based on the adjudicated aboriginal land of the Indian Tribe.

(v) The Indian Tribe whose geographical affiliation is based on the acknowledged aboriginal land of the Indian Tribe.

(2) The Native Hawaiian organization with the closest cultural affiliation, in the following order, is:

(i) An 'ohana that can trace an unbroken connection of named individuals to one or more of the human remains or cultural items, but not necessarily to all of the human remains or cultural items from a specific site.

(ii) An 'ohana that can trace a relationship to the ahupua'a where the human remains or cultural items were removed and a direct kinship to one or more of the human remains or cultural items, but not necessarily an unbroken connection of named individuals.

(iii) An organization with affiliation only to the earlier occupants of the ahupua'a where the human remains or cultural items were removed, and not to the earlier occupants of any other ahupua'a.

(iv) An organization with affiliation to either:

(A) The earlier occupants of the ahupua'a where the human remains or cultural items were removed, as well as to the earlier occupants of other ahupua'a on the same island, but not to the earlier occupants of all ahupua'a on that island, or to the earlier occupants of any other island of the Hawaiian archipelago, or

(B) The earlier occupants of another island who accessed the ahupua'a where the human remains or cultural items were removed for traditional or customary practices and were buried there.

(v) An organization with affiliation to the earlier occupants of all ahupua‘a on the island where the human remains or cultural items were removed, but not to the earlier occupants of any other island of the Hawaiian archipelago.

(vi) An organization with affiliation to the earlier occupants of more than one island in the Hawaiian archipelago that has been in continuous existence from a date prior to 1893.

(vii) Any other Native Hawaiian organization with affiliation.

## **Subpart B—PROTECTION OF HUMAN REMAINS OR CULTURAL ITEMS ON FEDERAL OR TRIBAL LANDS**

### **§ 10.4 General.**

Whenever an Indian Tribe, Native Hawaiian organization, Federal agency, or the State of Hawai‘i Department of Hawaiian Home Lands (DHHL) has responsibility for human remains or cultural items on Federal or Tribal lands, it must comply with the requirements of this subpart. To ensure compliance with the Act, any permit, license, lease, right-of-way, or other authorization issued by an Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL for an activity on Federal or Tribal lands must include a requirement that the person responsible for the activity comply with §10.5 upon the discovery of human remains or cultural items. Prior to any excavation of human remains or cultural items on Federal or Tribal lands, an Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL must comply with §10.6.

(a) *Appropriate official.* To ensure compliance with the Act, the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL that has responsibility for human remains or cultural items on Federal or Tribal lands must designate one or more appropriate officials, as shown in Table 1 of this section. The appropriate official is responsible for carrying out the requirements of this subpart.

(b) *Plan of action.* On Federal lands in the United States or on Tribal lands in Hawai‘i, a plan of action is required for any planned activity (including an excavation authorized under §10.6) that is likely to result in a discovery or excavation of human remains or cultural items. Determining the likelihood of discovery or excavation must be based upon previous studies, discoveries, or excavations in the general proximity of the planned activity. Information from and the expertise of Native American cultural practitioners, while not required, may assist in determining the likelihood of discovery or excavation. In consultation with any lineal descendants, Indian Tribes, or Native Hawaiian organizations, the appropriate official must prepare, approve, and sign a plan of action.

(1) *Step 1 – Initiate consultation.* Before the planned activity begins, the appropriate official must identify consulting parties and make a good-faith effort to invite the parties to consult.

(i) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(ii) An invitation to consult must be in writing and must include:

(A) A description of the planned activity and its general location;

(B) The names of all identified consulting parties; and

(C) A proposed timeline and method for consultation.

(iii) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted to the appropriate official at any time.

(2) *Step 2 – Consult with requesting parties.* No later than 10 days after receiving a written request to consult, the appropriate official must respond in writing with a proposed timeline for consultation. The proposed timeline must allow for consultation to occur before the planned activity begins.

(i) In the response to the requesting party, the appropriate official must ask a requesting party for the following information, if not already provided:

(A) Recommendations on the proposed timeline and method for consultation; and

(B) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leaders, and known lineal descendant who should participate in consultation.

(ii) The consultation process must seek consensus, to the maximum extent possible, on the content of the plan of action.

(iii) The appropriate official must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. The appropriate official must record the concurrence, disagreement, or nonresponse of the requesting parties to the plan of action.

(3) *Step 3 – Approve and sign the plan of action.* Before the planned activity begins, the appropriate official must approve and sign a plan of action and must provide a copy to all consulting parties. At a minimum, the written plan of action must include:

(i) A description of the planned activity and its general location;

(ii) A list of all consulting parties identified under paragraph (b)(1) of this section;

(iii) A record of consultation under paragraph (b)(2) of this section;

(iv) The preference of requesting parties for:

(A) Stabilizing and covering human remains or cultural items in situ;

(B) Protecting and relocating human remains or cultural items, if removed; or

(C) Providing the appropriate treatment, care, or handling of human remains or cultural items; and

(v) The timeline and method for:

(A) Informing all identified consulting parties of a discovery;

(B) Evaluating the potential need for an excavation; and

(C) Completing the disposition, to include publication of a notice of intended disposition, under §10.7.

(c) *Comprehensive agreement.* To facilitate compliance with the Act, a Federal agency or DHHL may develop a written comprehensive agreement for all land managing activities on Federal or Tribal lands, or portions thereof, under its responsibility. The written comprehensive agreement must:

(1) Be developed in consultation with any Indian Tribe or Native Hawaiian organization identified under paragraph (b)(1) of this section and requesting to consult under paragraph (b)(2) of this section;

(2) Include, at minimum, a plan of action under paragraph (b)(3) of this section;

(3) Be consented to by a majority of requesting parties or lineal descendants identified under paragraph (b)(2) of this section. Evidence of consent will be by the authorized representative's signature on the agreement or by official correspondence to the Federal agency or DHHL; and

(4) Be signed by the appropriate official for the Federal agency or DHHL.

(d) *Federal agency coordination with other laws.* To manage compliance with the Act, a Federal agency may coordinate its responsibility under this subpart with its responsibilities under other relevant Federal laws. Compliance with this subpart does not relieve a Federal agency of the responsibility for compliance with the National Historic Preservation Act (54 U.S.C. 306108, commonly known as Section 106) or the Archeological and Historic Preservation Act (54 U.S.C. 312501-312508).

**Table 1 to §10.4: Appropriate official**

<b>For human remains or cultural items on...</b>	<b>the appropriate official is a representative for the...</b>
Federal lands in the United States	Federal agency with primary management authority
Tribal lands in Alaska and the continental United States	Indian Tribe

Tribal lands in Hawai‘i	DHHL
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### **§ 10.5 Discovery.**

When a discovery of human remains or cultural items on Federal or Tribal lands occurs, any person who knows or has reason to know of the discovery must inform the appropriate official for the responsible Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL. For any planned activity on Federal lands in the United States or on Tribal lands in Hawai‘i that is likely to result in a discovery of human remains or cultural items, the appropriate official must, in consultation with Indian Tribes and Native Hawaiian organizations, prepare, approve, and sign a plan of action under §10.4(b), unless the discovery is already covered by a signed comprehensive agreement under §10.4(c).

(a) *Report any discovery.* Any person who knows or has reason to know of a discovery of human remains or cultural items on Federal or Tribal lands must immediately report the discovery to the appropriate official and any additional point of contact shown in Table 1 of this section. The person making the discovery must make a reasonable effort to secure and protect the human remains or cultural items, including, as appropriate, stabilizing or covering the human remains or cultural items. No later than 24 hours after the discovery, the person making the discovery must send written documentation of the discovery, including the steps taken to secure and protect the human remains or cultural items, to the appropriate official and the additional point of contact shown in Table 1 of this section.

(b) *Cease any nearby activity.* To ensure compliance with the Act, any permit, license, lease, right-of-way, or other authorization issued by an Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL for an activity on Federal or Tribal lands must include a requirement that the person responsible for the activity comply with

this paragraph upon the discovery of human remains or cultural items. If a discovery is related to any such activity (including but not limited to construction, mining, logging, or agriculture), the person responsible for the activity must:

- (1) Immediately stop all activity around the discovery;

- (2) Immediately report the discovery to the appropriate official and any additional point of contact shown in Table 1 of this section;

- (3) Make a reasonable effort to secure and protect the human remains or cultural items, including, as appropriate, stabilizing and covering the human remains or cultural items;

- (4) No later than 24 hours after the discovery, send written documentation of the discovery to the appropriate official and any additional point of contact stating:

- (i) The general location and contents of the discovery,

- (ii) The activity related to the discovery,

- (iii) The steps taken to secure and protect the human remains or cultural items,

and

- (iv) Confirmation that all activity around the discovery has stopped and will not resume until the date in a written certification issued under paragraph (e) of this section.

(c) *Respond to a discovery.* No later than three days after receiving written documentation of a discovery, the appropriate official must respond to a discovery. The appropriate official must comply with the requirements of this section immediately upon learning of the discovery even if the discovery has not been properly reported.

- (1) The appropriate official must make a written record showing a reasonable effort to:

- (i) Take steps to secure and protect the human remains or cultural items;

- (ii) Verify that any activity around the discovery has stopped; and



(iii) Report the discovery to any additional point of contact shown in Table 1 of this section.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for the discovery to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (d) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for discoveries on its Tribal lands and then must respond to any discovery under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for discoveries, the appropriate official for DHHL is responsible for completing the requirements in paragraph (d) of this section for any discoveries on those Tribal lands of an NHO.

(d) *Approve and sign a plan of action.* On Federal lands in the United States or on Tribal lands in Hawai‘i, the appropriate official, in consultation with Indian Tribes and Native Hawaiian organizations, must prepare, approve, and sign a plan of action under §10.4(b) no later than 30 days after receiving written documentation of a discovery. To the maximum extent possible, the appropriate official must carry out the plan of action for any human remains or cultural items. This requirement does not apply if, before receiving written documentation of the discovery:

- (1) The appropriate official signed a plan of action under §10.4(b);
- (2) The appropriate official signed a comprehensive agreement under §10.4(c); or
- (3) A Native Hawaiian organization agreed in writing to be responsible for discoveries on its Tribal lands under paragraph (c)(3) of this section.

(e) *Certify that an activity may resume.* No later than 35 days after receiving written documentation of a discovery, the appropriate official must send a written certification to the person responsible for the activity that the activity may resume. The written certification must provide:

- (1) A copy of the signed plan of action or comprehensive agreement with redaction of any confidential or sensitive information to the extent of applicable law;
- (2) Instructions for protecting, stabilizing, or covering the human remains or cultural items, if appropriate;
- (3) A proposed timeline and method for evaluating the potential need for and authorization of an excavation of the human remains or cultural items, if applicable; and
- (4) The date (no later than 30 days after the date of the written certification) on which lawful activity may resume around the discovery.

**Table 1 to §10.5: Report a discovery on Federal or Tribal lands**

<b>Where the discovery is on...</b>	<b>the appropriate official is the representative for the...</b>	<b>and the additional point of contact is the ...</b>
Federal lands in the United States*	Federal agency with primary management authority	Any Indian Tribe or Native Hawaiian organization with potential affiliation, if known.
Tribal lands in Alaska and the continental United States	Indian Tribe	Bureau of Indian Affairs or the Federal agency with primary management authority, if any.
Tribal lands in Hawai‘i	DHHL	Any Native Hawaiian organization with potential affiliation, if known.
* Federal lands in Alaska selected but not yet conveyed under the Alaska Native Claims Settlement Act (ANCSA, 43 U.S.C. 1601)	Bureau of Land Management or Federal agency with primary management authority	Alaska Native Corporation or group organized under ANCSA.

**§ 10.6 Excavation.**

When an excavation of human remains or cultural items on Federal or Tribal lands is needed, the appropriate official may authorize the excavation only after complying with this section. The appropriate official must take reasonable steps to evaluate the potential need for an excavation of human remains or cultural items. A permit under Section 4 of ARPA (16 U.S.C. 470cc) is required when the excavation is on Federal or Tribal lands that are also ARPA Indian lands or ARPA Public lands, and there is no applicable permit exception or exemption under the ARPA uniform regulations at 18 CFR 1312, 32 CFR 229, 36 CFR 296, or 43 CFR 7.

(a) *On Tribal lands.* Before an excavation of human remains or cultural items may occur, the appropriate official must consent in writing by providing a written authorization for the excavation.

(1) At minimum, the written authorization must document:

(i) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items; and

(ii) Any permit that the Indian Tribe or Native Hawaiian organization legally requires.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for authorizing the excavation to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (b) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for excavations on its Tribal lands and then must provide written authorizations under this paragraph. If the Native Hawaiian organization has not

agreed in writing to be responsible for excavations, the appropriate official for DHHL is responsible for completing the requirements in paragraph (b) of this section for any excavations on those Tribal lands of an NHO.

(b) *On Federal lands in the United States or on Tribal lands in Hawai‘i.* Before an excavation of human remains or cultural items may occur, the appropriate official, must prepare, approve, and sign a plan of action under §10.4(b) and must provide a written authorization for the excavation.

(1) Prior to authorizing an excavation, the appropriate official, in consultation with Indian Tribes and Native Hawaiian organizations, must prepare, approve, and sign a plan of action under §10.4(b). To the maximum extent possible, the appropriate official must carry out the plan of action for any human remains or cultural items. This requirement does not apply if prior to authorizing the excavation:

- (i) The appropriate official signed a plan of action under §10.4(b);
- (ii) The appropriate official signed a comprehensive agreement under §10.4(c); or
- (iii) A Native Hawaiian organization agreed in writing to be responsible for excavations on its Tribal lands under paragraph (a)(3) of this section.

(2) At minimum, the written authorization must document:

- (i) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items; and
- (ii) Any permit that the Federal agency or DHHL legally requires.

#### **§ 10.7 Disposition.**

When human remains or cultural items are removed from Federal or Tribal lands, as soon as possible (but no later than one year) after the discovery or excavation of the human remains or cultural items, the appropriate official must determine the lineal descendant, Indian Tribe, or Native Hawaiian organization that has priority for disposition of human remains or cultural items using this section. On Federal lands in the

United States or on Tribal lands in Hawai‘i, when the appropriate official cannot reasonably determine any Indian Tribe or Native Hawaiian organization with priority for disposition of human remains or cultural items, the appropriate official must report the human remains or cultural items as unclaimed under paragraph (e) of this section.

(a) *Priority for disposition.* The disposition of human remains or cultural items removed from Federal or Tribal lands is determined in the following priority order:

(1) The known lineal descendants, if any, for human remains and associated funerary objects;

(2) The Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items originated;

(3) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at §10.3(d); or

(4) For human remains or cultural items from adjudicated aboriginal land, the Indian Tribe with the strongest relationship to the human remains or cultural items who makes a claim for disposition, which is:

(i) The adjudicated aboriginal land Indian Tribe who claims the human remains or cultural items, or

(ii) A different Indian Tribe who claims the human remains or cultural items and shows, by a preponderance of the evidence, a stronger cultural relationship to the human remains or cultural items than the adjudicated aboriginal land Indian Tribe.

(b) *To a lineal descendant.* When a lineal descendant is determined for human remains and associated funerary objects removed from Federal or Tribal lands, the appropriate official for the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL must send a written disposition statement to the lineal descendant. The disposition statement must acknowledge and recognize the lineal descendant has ownership or control of the human remains and associated funerary objects.

(1) Before sending the disposition statement, the appropriate official must consult with the lineal descendant on the care, custody, and physical transfer of the human remains and associated funerary objects.

(2) After sending the disposition statement, the appropriate official must:

(i) Document any physical transfer by recording the contents, recipient, and method of delivery; and

(ii) Protect sensitive information, as identified by the lineal descendant, from disclosure to the general public to the extent consistent with applicable law;

(3) After the disposition statement is sent, nothing in the Act or this part:

(i) Limits the authority of the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL to enter into any agreement with the lineal descendant concerning the care or custody of the human remains and associated funerary objects, or

(ii) Limits any procedural or substantive right which may otherwise be secured to the lineal descendant.

(c) *On Tribal lands.* When a lineal descendant cannot be determined for human remains and associated funerary objects, or in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the appropriate official for the Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items were removed must complete a written disposition statement.

(1) The written disposition statement must acknowledge and recognize:

(i) A lineal descendant could not be ascertained and

(ii) The Indian Tribe or Native Hawaiian organization has control or ownership of the human remains or cultural items.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for disposition of human remains or cultural items to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary

management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (d) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for disposition of human remains or cultural items from its Tribal lands and then must provide written disposition statements under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for dispositions, the appropriate official for DHHL is responsible for completing the requirements in paragraph (d) of this section for any dispositions from those Tribal lands of an NHO.

(4) After the disposition statement is complete, nothing in the Act or this part:

(i) Limits the authority of a Federal agency to enter into any agreement with the Indian Tribe or Native Hawaiian organization concerning the care or custody of the human remains or cultural items,

(ii) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(iii) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

(d) *On Federal lands in the United States or on Tribal lands in Hawai'i.* When a lineal descendant cannot be determined for human remains and associated funerary objects, or in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the appropriate official for the Federal agency or DHHL must determine the Indian Tribe or Native Hawaiian organization with priority for disposition under paragraph (a) of this section. When the appropriate official cannot reasonably

determine any Indian Tribe or Native Hawaiian organization with priority for disposition of human remains or cultural items, the Federal agency or DHHL must report the human remains or cultural items as unclaimed under paragraph (e) of this section. On Tribal lands in Hawai'i, this requirement is waived if the Native Hawaiian organization agreed in writing to be responsible for disposition of human remains or cultural items from its Tribal lands under paragraph (c)(3) of this section.

(1) *Step 1 – Inform consulting parties.* As soon as possible but no later than six months after a discovery or excavation of human remains or cultural items, the appropriate official must send a written document informing all consulting parties identified in the plan of action under §10.4(b)(1). Consultation on the disposition of human remains or cultural items may continue until publication of a notice of intended disposition under paragraph (d)(2) of this section. The appropriate official must send a written document to the consulting parties that includes:

(i) A description of the human remains or cultural items including the general location and date of discovery or excavation;

(ii) The name of each Indian Tribe or Native Hawaiian organization identified as having priority for disposition of the human remains or cultural items and a brief abstract of the information used to make that identification; and

(iii) A request that if the Indian Tribe or Native Hawaiian organization wishes to submit a claim for disposition of the human remains or cultural items, it should do so in writing no later than 30 days after publication of a notice in the *Federal Register*.

(2) *Step 2 – Submit a notice of intended disposition.* No earlier than 30 days and no later than six months after informing consulting parties, the appropriate official must submit a notice of intended disposition to the Manager, National NAGPRA Program, for publication in the *Federal Register*. If the human remains or cultural items are evidence



in an ongoing civil or criminal action under ARPA, the deadline for the notice is extended until the conclusion of the ARPA case.

(i) A notice of intended disposition must conform to the mandatory format of the *Federal Register* and include:

(A) A brief description of the human remains or cultural items, including the county and state where the human remains or cultural items were removed;

(B) The identity of the human remains or cultural items specifically as human remains, associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony, or both sacred objects and objects of cultural patrimony, and a brief abstract of the information used to make that identification;

(C) The name of each Indian Tribe or Native Hawaiian organization with priority for disposition of the human remains or cultural items and a brief abstract of the information used to make that identification;

(D) The name, phone number, email address, and mailing address for the appropriate official who is responsible for receiving written claims for disposition of the human remains or cultural items;

(E) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the appropriate official may send a disposition statement to a claimant; and

(F) The date (to be calculated by the *Federal Register* one year from the date of publication) on which the human remains or cultural items will become unclaimed human remains or cultural items if no written claim is received from an Indian Tribe or Native Hawaiian organization.

(ii) No later than 15 days after receiving a notice of intended disposition, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the *Federal Register* a notice of intended disposition that conforms to the requirements under paragraph (d)(2)(i) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not meet the requirements under paragraph (d)(2)(i) of this section.

(3) *Step 3 – Receive and consider a claim for disposition.* After publication of a notice of intended disposition in the *Federal Register*, any Indian Tribe or Native Hawaiian organization may submit to the appropriate official a written claim for disposition of human remains or cultural items.

(i) A claim for disposition of human remains or cultural items must be received by the appropriate official before the appropriate official sends a disposition statement for the human remains or cultural items to a claimant under paragraph (d)(5) of this section or the transfer or reinterment of the human remains or cultural items under paragraph (e)(4) of this section. Any claim for disposition received by the appropriate official no later than 30 days after publication of a notice must be considered. A claim for disposition received by the appropriate official before the publication of the notice of intended disposition is dated the same date the notice was published.

(ii) Claims from two or more Indian Tribes or Native Hawaiian organizations who agree to joint disposition of the human remains or cultural items are considered a single claim and not competing claims.

(iii) A claim for disposition must satisfy one of the following criteria:

(A) The claim is from an Indian Tribe or Native Hawaiian organization identified in the notice of intended disposition with priority for disposition, or

(B) The claim is not from an Indian Tribe or Native Hawaiian organization identified in the notice of intended disposition, and shows that the claimant is a lineal descendant, Indian Tribe, or Native Hawaiian organization having priority for disposition under paragraph (a) of this section.

(4) *Step 4 – Respond to a claim for disposition.* No earlier than 30 days after publication of a notice of intended disposition but no later than 30 days after receiving a claim for disposition, the appropriate official must send a written response to the claimant with a copy to any other party identified in the notice with priority for disposition.

(i) In the written response, the appropriate official must state one of the following:

(A) The claim meets the criteria under paragraph (d)(3) of this section. The appropriate official will send a disposition statement to the claimant under paragraph (d)(5) of this section, unless the appropriate official receives additional, competing claims for disposition of human remains or cultural items.

(B) The claim does not meet the criteria under paragraph (d)(3) of this section. The appropriate official must provide a detailed explanation why the claim does not meet the criteria and an opportunity for the claimant to provide additional information to meet the criteria.

(C) The appropriate official has received competing claims for disposition of the human remains or cultural items that meet the criteria and must determine the most appropriate claimant using the procedures and timelines under paragraph (d)(4)(ii) of this section.

(ii) At any time before sending a disposition statement for human remains or cultural items under paragraph (d)(5) of this section, the appropriate official may receive additional, competing claims for disposition of the human remains or cultural items that meet the criteria under paragraph (d)(3) of this section. The appropriate official must determine the most appropriate claimant using the priority for disposition under paragraph (a) of this section.

(A) No later than 10 days after receiving a competing claim, the appropriate official must send a written letter to each claimant identifying all claimants and the date each claim was received,

(B) No later than 120 days after informing the claimants of competing claims, the appropriate official must send a written determination to each claimant identifying the most appropriate claimant(s), and

(C) No earlier than 30 days but no later than 90 days after sending a determination of the most appropriate claimant(s), the appropriate official must send a disposition statement to the most appropriate claimant(s) under paragraph (d)(5) of this section.

(5) *Step 5 – Disposition of the human remains or cultural items.* No later than 90 days after responding to a claim for disposition that meets the criteria, the appropriate official must send a written disposition statement to the claimant(s) and a copy to the Manager, National NAGPRA Program. The disposition statement must acknowledge and recognize the claimant(s) has control or ownership of the human remains or cultural items. Disposition must be in a manner that, to the maximum extent possible, respects the traditions of the lineal descendant, Indian Tribe, or Native Hawaiian organization. In the case of joint claims for disposition, the disposition statement must be sent to and must identify all claimants.

(i) Before sending the disposition statement, the appropriate official must consult with the claimant(s) on the care, custody, and physical transfer of the human remains or cultural items.

(ii) After sending the disposition statement, the appropriate official must:

(A) Document any physical transfer by recording the contents, recipient(s), and method of delivery and

(B) Protect sensitive information, as identified by the claimant(s), from disclosure to the general public to the extent consistent with applicable law.

(iii) After the disposition statement is sent, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the Indian Tribe or Native Hawaiian organization concerning the care or custody of the human remains or cultural items,

(B) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

(e) *Unclaimed human remains or cultural items removed from Federal lands in the United States or from Tribal lands in Hawai‘i.* When the appropriate official cannot complete the disposition of human remains or cultural items under paragraph (d) of this section, the Federal agency or DHHL must report the human remains or cultural items as unclaimed. The appropriate official must, to the maximum extent possible, respect the traditions of the Indian Tribe or Native Hawaiian organization that may have priority for disposition under paragraph (a) of this section.

(1) *Step 1 – Submit a list of unclaimed cultural items.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], the Federal agency or DHHL must submit to the Manager, National NAGPRA Program, a list of all unclaimed cultural items in its custody. The Federal agency or DHHL must submit updates to its list of unclaimed cultural items by December 31 each year.

(i) Human remains or cultural items are unclaimed when:

(A) One year after publishing a notice of intended disposition under paragraph (d)(2) of this section, no Indian Tribe or Native Hawaiian organization submits a written claim for disposition, or

(B) One year after discovery or excavation of the human remains or cultural items, the appropriate official could not reasonably identify any lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(ii) A list of unclaimed human remains or cultural items must include:

(A) A brief description of the human remains or cultural items, including the county and state where the human remains or cultural items were removed;

(B) The names of all consulting parties and an abstract of the results of consultation;

(C) If known, the identity of the human remains or cultural items specifically as human remains, associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony, or both sacred objects and objects of cultural patrimony, and a brief abstract of the information used to make that identification; and

(D) If known, the name of each Indian Tribe or Native Hawaiian organization with priority for disposition under paragraph (a) of this section and a brief abstract of the information used to make that identification.

(iii) At any time before transferring or reintering human remains or cultural items under paragraph (e)(4) of this section, the appropriate official may receive a claim for disposition of the human remains or cultural items and must evaluate whether the claim meets the criteria under paragraph (d)(3) of this section. Any agreement to transfer or decision to reinter the human remains or cultural items under this paragraph is stayed until the claim for disposition is resolved under paragraph (d) of this section. No later than 10 days after receiving a claim for disposition, the appropriate official must send a written letter to each claimant or requestor identifying all claimants and requestors and the date each claim or request was received.

(A) If the claim meets the criteria under paragraph (d)(3) of this section and a notice of intended disposition was published under paragraph (d)(2) of this section, the appropriate official must respond in writing under paragraph (d)(4) and proceed with disposition under (d)(5) of this section.

(B) If the claim meets the criteria under paragraph (d)(3) of this section but no notice of intended disposition was published, the appropriate official must submit a notice of intended disposition under paragraph (d)(2), respond in writing under paragraph (d)(4), and proceed with disposition under (d)(5) of this section.

(C) No later than 90 days after responding to a claim for disposition that meets the criteria, the appropriate official must send a written letter to each claimant or requestor identifying the claimant that has control or ownership of the human remains or cultural items.

(D) If the claim does not meet the criteria under paragraph (d)(3) of this section, the appropriate official must respond in writing under paragraph (d)(4) and may proceed with transfer or reinterment under paragraph (e)(2) of this section.

(2) *Step 2 – Agree to transfer or decide to reinter human remains or cultural items.* Subject to the requirements in paragraph (e)(3) of this section, and at the discretion of the Federal agency or DHHL, a Federal agency or DHHL may:

(i) Agree in writing to transfer unclaimed cultural items to a requestor that agrees to treat the human remains or cultural items according to the requestor's laws and customs. Unclaimed cultural items must be requested in writing and may only be requested by:

(A) An Indian Tribe or Native Hawaiian organization, or

(B) An Indian group that is not federally recognized but has a relationship to unclaimed human remains or associated funerary objects.

(ii) Decide in writing to reinter unclaimed human remains or funerary objects according to applicable laws and policies.

(3) *Step 3 – Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains or cultural items, the Federal agency or DHHL must submit a notice of proposed transfer or reinterment to the Manager, National NAGPRA Program for publication in the *Federal Register*. The Federal agency or DHHL must send a copy of the published notice to any Indian Tribe or Native Hawaiian organization identified as having a priority for disposition under paragraph (a) of this section.

(i) A notice of proposed transfer or reinterment must conform to the mandatory format of the *Federal Register* and include:

(A) The details provided in the list of unclaimed cultural items under paragraph (e)(1) of this section;

(B) The name of each Indian Tribe, Native Hawaiian organization, or Indian group requesting the human remains or cultural items or a statement that the Federal agency or DHHL will reinter the human remains or funerary objects;

(C) The name, phone number, email address, and mailing address for the appropriate official who is responsible for receiving written claims for disposition of the human remains or cultural items; and

(D) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the Federal agency or DHHL may proceed with the transfer or reinterment of the human remains or cultural items.

(ii) No later than 15 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, will:



(A) Approve for publication in the *Federal Register* a notice of proposed transfer or reinterment that conforms to the requirements under paragraph (e)(3)(i) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not meet the requirements under paragraph (e)(3)(i) of this section.

(4) *Step 4 – Transfer or reinter the human remains or cultural items.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the appropriate official must transfer or reinter the human remains or cultural items.

(i) After transferring or reintering, the appropriate official must:

(A) Document the transfer by recording the contents, recipient, and method of delivery,

(B) Document the reinterment by recording the contents of the reinterment,

(C) Protect sensitive information about the human remains or cultural items from disclosure to the general public to the extent consistent with applicable law.

(ii) After transfer or reinterment occurs, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the requestor concerning the care or custody of the human remains or cultural items,

(B) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

**Subpart C—REPATRIATION OF HUMAN REMAINS OR CULTURAL ITEMS  
BY MUSEUMS OR FEDERAL AGENCIES**

## **§ 10.8 General.**

Each museum and Federal agency that has possession or control of a holding or collection that may contain human remains, funerary objects, sacred objects, or objects of cultural patrimony must comply with the requirements of this subpart, regardless of the physical location of the holding or collection. Each museum and Federal agency must identify one or more authorized representatives who are responsible for carrying out the requirements of this subpart.

(a) *Museum holding or collection.* A museum must comply with this subpart for all holdings or collections under its possession or control that contain human remains or cultural items, including a new holding or collection or a previously lost or previously unknown holding or collection.

(1) A museum must determine whether it has sufficient interest in a holding or collection to constitute possession or control on a case-by-case basis given the relevant information about the holding or collection.

(i) A museum may have custody of a holding or collection but not possession or control. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

(ii) If a museum has custody of a holding or collection, the museum may be required to report the holding or collection under paragraphs (c) or (d) of this section.

(2) Any museum that completes repatriation of human remains and cultural items or transfers or reinters human remains and associated funerary objects in good faith under this subpart shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of the Act or this part.

(b) *Federal agency holding or collection.* A Federal agency must comply with this subpart for all holdings or collections in its possession or control that contain human remains and cultural items, including a previously lost or previously unknown holding or collection. A Federal agency must determine if a holding or collection:

(1) Was in its possession or control on or before November 16, 1990; or

(2) Came into its possession or control after November 16, 1990, and was removed from:

(i) An unknown location, or

(ii) Lands that are neither Federal nor Tribal lands as defined in this part.

(c) *Museums with custody of a Federal agency holding or collection.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each museum that has custody of a Federal agency holding or collection that contains Native American human remains or cultural items must submit a statement describing that holding or collection to the authorized representatives of the Federal agency most likely to have possession or control and to the Manager, National NAGPRA Program.

(1) No later than 120 days following receipt of a museum's statement, the Federal agency must respond to the museum and the Manager, National NAGPRA program, with a written acknowledgement of one of the following:

(i) The Federal agency has possession or control of the holding or collection;

(ii) The Federal agency does not have possession or control of the holding or collection; or

(iii) The Federal agency and the museum have joint possession or control of the holding or collection.

(2) Failure to issue such a determination by the deadline will constitute acknowledgement that the Federal agency has possession or control. The Federal agency

is ultimately responsible for the requirements of this subpart for all holdings or collections under its possession or control, regardless of the physical location of the holdings or collection.

(d) *Museums with custody of other holdings or collections.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each museum that has custody of a holding or collection that contains Native American human remains or cultural items and for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program.

(e) *Contesting actions on repatriation.* An affected party under §10.12(c)(1) who wishes to contest actions made by museums or Federal agencies under this subpart is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. Informal negotiations may include requesting the assistance of the Manager, National NAGPRA Program, or the Review Committee under §10.12.

#### **§ 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.**

Each museum and Federal agency that has possession or control of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony must follow the steps in this section. The purpose of this section is to provide general information about a holding or collection to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

(a) *Step 1 – Complete a summary of a holding or collection.* Based on the information available, a museum or Federal agency must submit to the Manager, National NAGPRA Program, a summary describing its holding or collection that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Depending on the scope of the holding or collection, a museum or Federal agency may organize its summary into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the summary is comprehensive and covers all holdings or collections relevant to this section.

(1) A summary must include:

(i) The estimated number and a general description of the holding or collection, including any potential unassociated funerary objects, sacred objects, and objects of cultural patrimony;

(ii) The county and state where the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony were removed;

(iii) The acquisition history (provenance) of the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony;

(iv) Other information relevant for identifying:

(A) A lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(B) Any object or item as an unassociated funerary object, sacred object, or object of cultural patrimony; and

(v) The presence of any potentially hazardous substances used to treat any of the unassociated funerary objects, sacred objects, or objects of cultural patrimony, if known.

(2) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

(3) Prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must have submitted a summary to the Manager, National NAGPRA Program:

(i) By November 16, 1993, for unassociated funerary objects, sacred objects, and objects of cultural patrimony subject to the Act;

(ii) By October 20, 2007, for unassociated funerary objects, sacred objects, and objects of cultural patrimony acquired or located after November 16, 1993;

(iii) By April 20, 2010, for unassociated funerary objects, sacred objects, and objects of cultural patrimony in the possession or control of a museum that received Federal funds for the first time after November 16, 1993;

(iv) Within six months of acquiring or locating unassociated funerary objects, sacred objects, and objects of cultural patrimony after October 20, 2007; or

(v) Within three years of receiving Federal funds for the first time after April 20, 2010.

(4) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], when a holding or collection previously included in a summary is transferred to a museum or Federal agency, The museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed summary. The museum or Federal agency must submit the previously completed summary to the Manager, National NAGPRA Program, no later than 30 days after acquiring the holding or collection. The museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section and must initiate consultation under paragraph (b) of this section.

(b) *Step 2 – Initiate consultation.* No later than 30 days after completing a summary, a museum or Federal agency must identify consulting parties based on information available and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

- (i) The summary described in paragraph (a)(1) of this section;
- (ii) The names of all identified consulting parties; and
- (iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of intended repatriation under paragraph (f) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than six months after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the *Federal Register* pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3 – Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on an unassociated funerary object, sacred object, or object of cultural patrimony may continue until the museum or Federal agency sends a repatriation statement for that object to a requestor under paragraph (g) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

- (i) Recommendations on the proposed timeline and method for consultation; and

(ii) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leader, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, to the maximum extent possible, on determining:

(i) Lineal descendants;

(ii) Indian Tribes or Native Hawaiian organizations with cultural affiliation;

(iii) The types of objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

(iv) The appropriate treatment, care, and handling of unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before a museum or Federal agency sends a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section, the museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to the holding or collection. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the unassociated funerary object, sacred object, or object of cultural patrimony.



(d) *Step 4 – Receive and consider a request for repatriation.* After a summary is complete, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony.

(1) A request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for that unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section. A request for repatriation received by the museum or Federal agency before the deadline for completing a summary is dated the same date as the deadline for completing the summary.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony are considered a single request and not competing requests.

(3) A request for repatriation must satisfy all the following criteria:

(i) Each unassociated funerary object, sacred object, or object of cultural patrimony being requested meets the definition of an unassociated funerary object, a sacred object, or an object of cultural patrimony;

(ii) The request is from a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation; and

(iii) The request includes information to support a finding that the museum or Federal agency does not have right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

(e) *Step 5 – Respond to a request for repatriation.* No later than 60 days after receiving a request for repatriation, a museum or Federal agency must send a written

response to the requestor. Using all information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request for repatriation satisfies the criteria under paragraph (d) of this section. In the written response, the museum or Federal agency must state one of the following:

(1) The request meets the criteria under paragraph (d) of this section. The museum or Federal agency will submit a notice of intended repatriation under paragraph (f) of this section.

(2) The request does not meet the criteria under paragraph (d) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria and an opportunity for the requestor to provide additional information to meet the criteria.

(3) The request meets the criteria under paragraph (d)(3)(i) and (ii) of this section, but the museum or Federal agency asserts a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony and refuses to complete repatriation of the requested object to the requestor. The museum or Federal agency must provide information to prove that the museum or Federal agency has a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

(4) The museum or Federal agency has received competing requests for repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (h) of this section.

(f) *Step 6 – Submit a notice of intended repatriation.* No later than 30 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must submit a notice of intended repatriation to the Manager, National NAGPRA Program, for publication in the *Federal Register*. The museum or Federal agency may

include in a single notice all unassociated funerary objects, sacred objects, or objects of cultural patrimony with the same requestor.

(1) A notice of intended repatriation must conform to the mandatory format of the *Federal Register* and include:

(i) The number of unassociated funerary object, sacred object, or object of cultural patrimony and a brief description of each object (counted separately or by lot);

(ii) The county and state where the unassociated funerary object, sacred object, or object of cultural patrimony were removed;

(iii) The acquisition history (provenance) of the unassociated funerary object, sacred object, or object of cultural patrimony, including the circumstances surrounding its acquisition;

(iv) The identity of each unassociated funerary object, sacred object, or object of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony, and a brief abstract of the information used to make that identification;

(v) The lineal descendant, Indian Tribe, or Native Hawaiian organization requesting repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony and a brief abstract of the information showing the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(vi) Information about the presence of any potentially hazardous substances used to treat the unassociated funerary object, sacred object, or object of cultural patrimony, if known;

(vii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(viii) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(2) No later than 15 days after receiving a notice of intended repatriation, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the *Federal Register* a notice of intended repatriation that conforms to the requirements under paragraph (f)(1) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (f)(1) of this section.

(3) If the number or identity of unassociated funerary objects, sacred objects, or objects of cultural patrimony stated in a published notice of intended repatriation changes before the museum or Federal agency sends a repatriation statement under paragraph (g) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA Program. A museum or Federal agency is not required to submit a correction notice if there are additional pieces belonging to an unassociated funerary object, sacred object, or object of cultural patrimony previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number or new identity of the unassociated funerary object, sacred object, or object of cultural patrimony, the museum or Federal agency must submit a correction notice containing, as applicable:

(i) The corrected number of unassociated funerary object, sacred object, or object of cultural patrimony and corrected brief description of each object;

(ii) The corrected identity of the unassociated funerary objects, sacred objects, or objects of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural

patrimony, and corrected brief abstract of the information used to make that identification;

(iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(iv) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(4) At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (h) of this section.

(g) *Step 7 – Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.* No earlier than 30 days and no later than 90 days after publication of a notice of intended repatriation, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested unassociated funerary object, sacred object, or object of cultural patrimony. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony,

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public to the extent consistent with applicable law.

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the unassociated funerary object, sacred object, or object of cultural patrimony.

(h) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) For an unassociated funerary object or sacred object, in the following priority order, the most appropriate requestor is:

(i) The lineal descendant, if any, or

(ii) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at §10.3(d).

(2) For an object of cultural patrimony, the most appropriate requestor is the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at §10.3(d).

(3) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request was received.

(4) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined and the competing requests were received before the publication of a notice of intended repatriation. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) Submit a notice of intended repatriation in accordance with paragraph (f) of this section no later than 30 days after sending the determination, and

(C) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(ii) The most appropriate requestor has been determined and a notice of intended repatriation was previously published. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(iii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (i) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(i) *Stay of repatriation.* Repatriation under paragraph (g) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (h) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section.

(3) Before the publication of a notice of intended repatriation under paragraph (f) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.



(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study commenced, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of the study;

(D) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

(E) Provide the position titles of the persons responsible for each step in the schedule; and

(F) Affirm that the study has in place the requisite funding.

(ii) If the Secretary concurs with the request, the Secretary will send a written concurrence and specify the date by which the scientific study must be completed.

(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (f) of this section.

(iv) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section.

**Table 1 to §10.9: Deadlines for completing a summary**

<b>If a museum or Federal agency...</b>	<b>...a summary must be submitted...</b>
acquires possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony	6 months after acquiring possession or control of the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
locates previously lost or unknown unassociated funerary objects, sacred objects, or objects of cultural patrimony	6 months after locating the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
receives Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], and has possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony	3 years after receiving Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

### **§ 10.10 Repatriation of human remains and associated funerary objects.**

Each museum and Federal agency that has possession or control of a holding or collection that contains human remains or associated funerary objects must follow the steps in this section. The purpose of this section is to provide determinations, following consultation, about human remains and associated funerary objects to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

(a) *Step 1 – Compile an itemized list of human remains and associated funerary objects.* Based on information available, a museum or Federal agency must compile a simple itemized list of the human remains and associated funerary objects in its holding or collection. Depending on the scope of the holding or collection, a museum or Federal agency may organize its inventory into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section. The itemized list must include:

(1) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the

number of individuals. If human remains are in a holding or collection, the number of individuals is at least one;

(2) The number of associated funerary objects and types of objects (counted separately or by lot);

(3) The county and state where the human remains and associated funerary objects were removed;

(4) The acquisition history (provenance) of the human remains and associated funerary objects;

(5) Other information relevant for identifying a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation; and

(6) The presence of any potentially hazardous substances used to treat any of the human remains or associated funerary objects, if known.

(b) *Step 2 – Initiate consultation.* Based on information available, a museum or Federal agency must identify consulting parties and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

(i) The simple itemized list described in paragraph (a) of this section;

(ii) The names of all identified consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of inventory completion under paragraph (e) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than two years after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the *Federal Register* pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3 – Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on human remains and associated funerary objects may continue until the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects to a requestor under paragraph (h) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

(i) Recommendations on the proposed timeline and method for consultation; and

(ii) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leaders, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, to the maximum extent possible, on determining:

(i) Lineal descendants;

(ii) Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation;

(iii) The types of objects that might be associated funerary objects, including any objects that were made exclusively for burial purposes or to contain human remains; and

(iv) The appropriate treatment, care, and handling of human remains and associated funerary objects.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before the museum or Federal agency sends a repatriation statement for human remains and associated funerary objects to a requestor under paragraph (h) of this section, a museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to those human remains and associated funerary objects. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the human remains and associated funerary objects.

(d) *Step 4 – Complete an inventory of human remains and associated funerary objects.* Based on information available and the results of consultation, a museum or Federal agency must submit to all consulting parties and the Manager, National NAGPRA Program, an inventory of all human remains and associated funerary objects in its holding or collection.

(1) An inventory must include:

(i) The names of all consulting parties and an abstract of the results of consultation;

(ii) The information from the simple itemized list compiled under paragraph (a) of this section;

(iii) For each entry in the itemized list, a determination of one or more of the following:

(A) There is a known lineal descendant,

(B) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through cultural affiliation,

(C) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through geographical affiliation, or

(D) There is no connection between the human remains and associated funerary objects and any Indian Tribe or Native Hawaiian organization; and

(iv) An abstract of the information supporting that determination including:

(A) The lineal descendant or the Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation, or

(B) An explanation why no Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation could be reasonably identified.

(2) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

(3) Prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must have submitted an inventory to all consulting parties and the Manager, National NAGPRA Program:

(i) By November 16, 1995, for human remains or associated funerary objects subject to the Act;

(ii) By April 20, 2009, for human remains or associated funerary objects acquired or located after November 16, 1995;

(iii) By April 20, 2012, for human remains or associated funerary objects in the possession or control of a museum that received Federal funds for the first time after November 16, 1995;

(iv) Within two years of acquiring or locating the human remains or associated funerary objects after April 20, 2009; or

(v) Within five years of receiving Federal funds for the first time after April 20, 2012.

(4) No later than [DATE 760 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], for any human remains or associated funerary objects listed in an inventory but not published in a notice of inventory completion prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must:

(i) Initiate consultation as described under paragraph (b) of this section;

(ii) Consult with requesting parties as described under paragraph (c) of this section;

(iii) Update its inventory to include the requirements described under paragraph (d)(1) of this section and ensure the inventory is comprehensive and covers all holdings or collections relevant to this section; and

(iv) Submit an updated inventory to all consulting parties and the Manager, National NAGPRA Program.

(5) Any museum may request an extension to complete or update its inventory if it has made a good faith effort but will be unable to do so by the appropriate deadline. A request for an extension must be submitted to the Manager, National NAGPRA Program, before the appropriate deadline. The Manager, National NAGPRA Program will publish in the *Federal Register* a list of all museums who request an extension and the Secretary's determination on the request. A request for an extension must include:

- (i) Information showing the initiation of consultation and any requests to consult;
- (ii) The names of all consulting parties and an abstract of the results of consultation;
- (iii) The estimated number of the human remains and associated funerary objects in the holding or collection; and
- (iv) A written plan for completing or updating the inventory, which includes, at minimum:
  - (A) The specific steps required to complete or update the inventory;
  - (B) A schedule for completing each step and estimated inventory completion or update date;
  - (C) Position titles of the persons responsible for each step in the schedule; and
  - (D) A proposal to obtain any requisite funding needed to complete or update the inventory.

(6) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], when a holding or collection previously included in an inventory is transferred to a museum or Federal Agency, subject to the limitations in 18 U.S.C. 1170 (a), the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed or updated inventory. The museum or Federal agency must submit the previously completed or updated inventory to the Manager, National NAGPRA Program no later than 30 days



after acquiring the holding or collection and must initiate consultation under paragraph (b) of this section. The museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section.

(e) *Step 5 – Submit a notice of inventory completion.* No later than six months after completing or updating an inventory under paragraph (d) of this section, a museum or Federal agency must submit a notice of inventory completion for human remains and associated funerary objects with a known lineal descendant or a connection to an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation. The museum or Federal agency may include in a single notice all human remains and associated funerary objects having the same lineal descendant or the same Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation.

(1) The notice of inventory completion must be sent to the:

(i) Lineal descendants and Indian Tribes or Native Hawaiian organizations identified in the inventory, and

(ii) Manager, National NAGPRA Program, for publication in the *Federal Register*.

(2) A notice of inventory completion must conform to the mandatory format of the *Federal Register* and include:

(i) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.

(ii) The number of associated funerary objects and types of objects (counted separately or by lot);

(iii) The county and state where the human remains and associated funerary objects were removed;

(iv) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surrounding their acquisition;

(v) The lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation and a brief abstract of the information used to make that identification;

(vi) When cultural affiliation has been determined, a statement whether cultural affiliation was clearly identified or was based on the totality of the circumstances surrounding acquisition history of the human remains and associated funerary objects;

(vii) Information about the presence of any potentially hazardous substances used to treat the human remains or associated funerary objects, if known;

(viii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(ix) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to a requestor.

(3) No later than 15 days after receiving a notice of inventory completion, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the *Federal Register* a notice of inventory completion that conforms to the requirements under paragraph (e)(2) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (e)(2) of this section.

(4) If the number of individuals or the number of associated funerary objects stated in a published notice of inventory completion changes before the museum or

Federal agency sends a repatriation statement under paragraph (h) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA Program. A museum or Federal agency is not required to publish a correction notice if there are additional pieces belonging to human remains or associated funerary objects previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number of individuals or associated funerary objects, the museum or Federal agency must submit a correction notice containing, as applicable:

- (i) The corrected number of individuals;
- (ii) The corrected number of associated funerary objects and types of objects,
- (iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation, and
- (iv) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(f) *Step 6 – Receive and consider a request for repatriation.* After publication of a notice of inventory completion in the *Federal Register*, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of human remains and associated funerary objects.

(1) A request for repatriation of human remains and associated funerary objects must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects under paragraph (h) of this section. Any request for repatriation received by the museum or Federal agency no later than 30 days after publication of a notice must be considered. A request for repatriation received by the museum or Federal agency before the

publication of the notice of inventory completion is dated the same date the notice was published.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests.

(3) A request for repatriation must satisfy one of the following criteria:

(i) The request is from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, or

(ii) The request is not from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, and shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation.

(g) *Step 7 – Respond to a request for repatriation.* No earlier than 30 days after publication of a notice of inventory completion but no later than 30 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor with a copy to any other party identified in the notice of inventory completion. Using all information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request satisfies the criteria under paragraph (f) of this section.

(1) In the written response, the museum or Federal agency must state one of the following:

(i) The request meets the criteria under paragraph (f) of this section. The museum or Federal agency will send a repatriation statement to the requestor under paragraph (h) of this section, unless the museum or Federal agency receives additional, competing requests for repatriation.

(ii) The request does not meet the criteria under paragraph (f) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria, and an opportunity for the requestor to provide additional information to meet the criteria.

(iii) The museum or Federal agency has received competing requests for repatriation that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (i) of this section.

(2) At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meet the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (i) of this section.

(h) *Step 8 – Repatriation of the human remains and associated funerary objects.*  
No later than 90 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested human remains and associated funerary objects. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the human remains and associated funerary objects.

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public to the extent consistent with applicable law.

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.

(i) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meets the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) In the following priority order, the most appropriate requestor is:

(i) The known lineal descendant, if any; or

(ii) The Indian Tribe or Native Hawaiian organization with the closest affiliation according to the priority order at §10.3(d).

(2) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request for repatriation was received.

(3) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (h) of this section.

(ii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (j) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(j) *Stay of repatriation.* Repatriation under paragraph (h) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (i) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(3) Before the publication of a notice of inventory completion under paragraph (e) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the human remains and associated funerary objects are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.

(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study commenced, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the human remains and associated funerary objects is indispensable for completion of the study;

(D) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

(E) Provide the position titles of the persons responsible for each step in the schedule; and

(F) Affirm that the study has in place the requisite funding.

(ii) If the Secretary concurs with the request, the Secretary will send a written concurrence and specify the date by which the scientific study must be completed.



(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (e) of this section.

(iv) No earlier than 30 days after publication of the notice of inventory completion and no later than 90 days after responding to a request for repatriation, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(k) *Transfer or reinter human remains and associated funerary objects.* For human remains and associated funerary objects with no connection to an Indian Tribe or Native Hawaiian organization determined in the inventory, a museum or Federal agency, at its discretion, may agree to transfer or decide to reinter the human remains and associated funerary objects. The museum or Federal agency must ensure it has initiated consultation under paragraph (b) of this section, if any.

(1) *Step 1 – Agree to transfer or decide to reinter.* Subject to the requirements in paragraph (k)(2) of this section, a museum or Federal agency may:

(i) Agree in writing to transfer the human remains and associated funerary objects to a requestor that agrees to treat the human remains and associated funerary objects according to the requestor's laws and customs. Human remains and associated funerary objects must be requested in writing and may only be requested by:

(A) An Indian Tribe or Native Hawaiian organization, or

(B) An Indian group that is not federally recognized but has a relationship to the human remains and associated funerary objects.

(ii) Decide in writing to reinter the human remains and associated funerary objects according to applicable laws and policies.

(2) *Step 2 – Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains and associated

funerary objects, the museum or Federal agency must submit a notice of proposed transfer or reinterment to the Manager, National NAGPRA Program, for publication in the *Federal Register*.

(i) A notice of proposed transfer or reinterment must conform to the mandatory format of the *Federal Register* and include:

(A) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.;

(B) The number of associated funerary objects and type of objects (counted separately or by lot);

(C) The county and state where the human remains and associated funerary objects were removed, if known;

(D) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surround their acquisition;

(E) The names of all consulting parties and an abstract of the results of consultation;

(F) A brief abstract of the information that explains why no Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation could be reasonably identified;

(G) Information about the presence of any potentially hazardous substances used to treat the human remains and associated funerary objects, if known;

(H) The Indian Tribe, Native Hawaiian organization, or Indian group requesting the human remains and associated funerary objects or a statement that the museum or Federal agency will reinter the human remains and associated funerary objects;

(I) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(J) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may proceed with the transfer or reinterment of the human remains and associated funerary objects.

(ii) No later than 15 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the *Federal Register* a notice of proposed transfer or reinterment that conforms to the requirements under paragraph (k)(2)(i) of this section; or

(B) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (k)(2)(i) of this section.

(iii) After publication of a notice, if the museum or Federal agency receives a request for repatriation of the human remains and associated funerary objects before transfer or reinterment, the museum or Federal agency must evaluate whether the request meets the criteria under paragraph (f) of this section.

(A) If the request for repatriation meets the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with repatriation under paragraph (h) of this section.

(B) If the request does not meet the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with transfer or reinterment under paragraph (k)(3) of this section.

(3) *Step 3 – Transfer or reinter the human remains and associated funerary objects.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the museum or Federal agency must transfer or reinter

the human remains and associated funerary objects. After transferring or reinterring, the museum or Federal agency must:

(i) Document the transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery,

(ii) Document the reinterment by recording the contents of the reinterment,

(iii) Protect sensitive information from disclosure to the general public to the extent consistent with applicable law.

(4) After transfer or reinterment occurs, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.

**Table 1 to §10.10: Deadlines for completing an inventory**

<b>If a museum or Federal agency...</b>	<b>an inventory must be submitted...</b>
acquires possession or control of human remains or associated funerary objects	2 years after acquiring possession or control of human remains or associated funerary objects.
locates previously lost or unknown human remains or associated funerary objects	2 years after locating the human remains or associated funerary objects.
receives Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], and has possession or control of human remains or associated funerary objects	5 years after receiving Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

#### **§ 10.11 Civil penalties.**

Any museum that fails to comply with the requirements of the Act or this subpart may be assessed a civil penalty by the Secretary. This section does not apply to Federal agencies, but a Federal agency's failure to comply with the requirements of the Act or this part may be subject to other remedies under Federal law. Each instance of failure to comply will constitute a separate violation. The Secretary must serve the museum with a written notice of failure to comply under paragraph (d) of this section or a notice of

assessment under paragraph (g) of this section by personal delivery with proof of delivery date, certified mail with return receipt, or private delivery service with proof of delivery date.

(a) *File an allegation.* Any person may file an allegation of failure to comply by sending a written allegation to the Manager, National NAGPRA Program. Each allegation:

(1) Must include the full name, mailing address, telephone number, and (if available) email address of the person alleging the failure to comply;

(2) Must identify the specific provision or provisions of the Act or this subpart that the museum is alleged to have violated;

(3) Must enumerate the separate violations alleged, including facts to support the number of separate violations. The number of separate violations is determined by establishing relevant factors such as:

(i) The number of lineal descendants, Indian Tribes, or Native Hawaiian organizations named in the allegation and determined to be aggrieved by the failure to comply; or

(ii) The number of individuals or the number of funerary objects, sacred objects, or objects of cultural patrimony involved in the failure to comply;

(4) Should include information showing that the museum has possession or control of the Native American cultural items involved in the alleged failure to comply; and

(5) Should include information showing that the museum receives Federal funds.

(b) *Respond to an allegation.* Within 90 days of receiving an allegation, the Secretary must review the allegation and determine if the allegation meets the requirements of paragraph (a) of this section. After review, the Secretary may investigate the facts in an allegation to ensure all relevant information is available.

(1) The Secretary may request any additional relevant information from the person making the allegation, the museum, or other parties. The Secretary may conduct any investigation that is necessary to determine whether an alleged failure to comply is substantiated. The Secretary may also investigate appropriate factors for justifying an increase or reduction to any penalty amount that may be calculated.

(2) The Secretary, after reviewing all relevant information, must determine one of the following for each alleged failure to comply:

(i) The alleged failure to comply is substantiated, the number of separate violations is identified, and a civil penalty is an appropriate remedy. The Secretary will calculate the proposed penalty amount under paragraph (c) of this section and notify the museum under paragraph (d) of this section;

(ii) The alleged failure to comply is substantiated, the number of separate violations is identified, but a civil penalty is not an appropriate remedy. The Secretary will notify the museum under paragraph (d) of this section; or

(iii) The alleged failure to comply is unsubstantiated. The Secretary will send a written determination to the person making the allegation and to the museum.

(c) *Calculate the penalty amount.* If the Secretary determines under paragraph (b)(2)(i) of this section that a civil penalty is an appropriate remedy for a substantiated failure to comply, the Secretary will calculate the amount of the penalty in accordance with this paragraph. The penalty for each separate violation will be calculated as follows:

(1) The base penalty amount is \$7,475, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74).

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(ii) The archaeological, historical, or commercial value of the human remains or cultural items involved;

(iii) The economic and non-economic damages suffered by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization, including expenditures by the aggrieved party to compel the museum to comply with the Act or this subpart;

(iv) The number of prior violations by the museum that have occurred; or

(v) Any other appropriate factor justifying an increase.

(3) The base penalty amount may be reduced if:

(i) The museum comes into compliance;

(ii) The museum agrees to mitigate the violation in the form of an actual or an in-kind payment to an aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(iii) The penalty constitutes excessive punishment under the circumstances;

(iv) The museum is unable to pay the full penalty and the museum has not previously been found to have failed to comply with the Act or this subpart. The museum has the burden of proving it is unable to pay by providing verifiable, complete, and accurate financial information to the Secretary. The Secretary may request that the museum provide such financial information that is adequate and relevant to evaluate the museum's financial condition, including the value of the museum's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the museum's ability to pay in installments over time. If the museum does not submit the requested financial information, the museum will be presumed to have the ability to pay the civil penalty; or

(v) Any other appropriate factor justifies a reduction.

(d) *Notify a museum of a failure to comply.* If the Secretary determines under paragraph (b)(2)(i) or (b)(2)(ii) of this section that an alleged failure to comply is substantiated, the Secretary must serve the museum with a written notice of failure to comply and send a copy of the notice to each person alleging the failure to comply and any lineal descendant, Indian Tribe, or Native Hawaiian organization named in the notice of failure to comply. The notice of failure to comply must:

(1) Provide a concise statement of the facts believed to show a failure to comply;

(2) Specifically reference the provisions of the Act and this subpart with which the museum has failed to comply;

(3) Include the proposed penalty amount calculated under paragraph (c) of this section;

(4) Include, where appropriate, any initial proposal to reduce or increase the penalty amount or an explanation for why the Secretary has determined that a penalty is not an appropriate remedy;

(5) Identify the options for responding to the notice of failure to comply under paragraph (e) of this section; and

(6) Inform the museum that the Secretary may assess a daily penalty amount under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Secretary takes effect.

(e) *Respond to a notice of failure to comply.* Within 45 days of receiving a notice of failure to comply, a museum may take no action and await service of a notice of assessment under paragraph (g) of this section, or a museum may file a written response to the notice of failure to comply. A response which is not timely filed will not be considered. Any written response must be signed by an authorized representative of the museum and must be sent to the Secretary. In the written response, a museum may:



(1) Seek an informal discussion of the failure to comply;

(2) Request either or both of the following forms of relief, with a full explanation of the legal or factual basis for the requested relief:

(i) That the Secretary reconsider the determination of a failure to comply, or

(ii) That the Secretary reduce the proposed penalty amount; or

(3) Accept the determination of a failure to comply and agree in writing that the museum will do the following, which will constitute an agreement between the Secretary and the museum:

(i) Pay the proposed penalty amount, if any,

(ii) Complete the mitigation required to reduce the penalty, if offered in the notice, and

(iii) Waive any right to receive notice of assessment under paragraph (g) of this section and to request a hearing under paragraph (i) of this section.

(f) *Assess the civil penalty.* After serving a notice of failure to comply, the Secretary may assess a civil penalty and must consider all available, relevant information related to the failure to comply, including information timely provided by the museum during any informal discussion or request for relief, furnished by another party, or produced upon the Secretary's request.

(1) The assessment of a civil penalty is made after the latter of:

(i) The 45-day period for a response has expired and the museum has taken no action;

(ii) Conclusion of informal discussion, if any;

(iii) Review and consideration of a petition for relief, if any; or

(iv) Failure to meet the terms of an agreement established under paragraph (e)(3) of this section.

(2) If a petition for relief or informal discussion warrants a conclusion that no failure to comply has occurred, the Secretary must send written notification to the museum revoking the notice of failure to comply. No penalty is assessed.

(g) *Notify the museum of an assessment.* If the Secretary determines to assess a civil penalty, the Secretary will serve the museum with a notice of assessment. Unless the museum seeks further administrative remedies under this section, the notice of assessment is the final administrative decision of the Secretary. The notice of assessment must:

(1) Specifically reference the provisions of the Act or this subpart with which the museum has not complied;

(2) Include the final amount of any penalty calculated under paragraph (c) of this section and the basis for determining the penalty amount;

(3) Include, where appropriate, any increase or reduction to the penalty amount or an explanation for why the Secretary has determined that a penalty is not an appropriate remedy;

(4) Include the daily penalty amount that the Secretary may assess under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Secretary takes effect. The daily penalty amount for each continuing violation shall not exceed \$1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74);

(5) Identify the options for responding to the notice of assessment under paragraph (h) of this section; and

(6) Notify the museum that it has the right to seek judicial review of the final administrative decision of the Secretary only if it has exhausted all administrative remedies under this section, as set forth in paragraph (l) of this section.

(h) *Respond to an assessment.* Within 45 days of receiving a notice of assessment, a museum must do one of the following:

(1) Accept the assessment and pay the penalty amount by means of a certified check made payable to the U.S. Treasurer, Washington, DC, sent to the Secretary. By paying the penalty amount, the museum waives the right to request a hearing under paragraph (i) of this section.

(2) File a written request for a hearing under paragraph (i) of this section to contest the failure to comply, the penalty assessment, or both. If the museum does not file a written request for a hearing within 45 days, the museum waives the right to request a hearing under paragraph (i) of this section.

(i) *Request a hearing.* The museum may file a written request for a hearing with the Departmental Cases Hearings Division (DCHD), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the notice of assessment, or by electronic means in accordance with an OHA Standing Order which is available on OHA's website at the web address specified in the notice of assessment. A copy of the request must be served on the Solicitor of the Department of the Interior at the address specified in the notice of assessment. The request for hearing and any document filed thereafter with the DCHD under paragraphs (i) or (j) of this section are subject to the rules that govern the method and effective date of filing under 43 CFR 4.22 and 4.422(a). The request for a hearing must:

(1) Include a copy of the notice of failure to comply and the notice of assessment;

(2) State the relief sought by the museum; and

(3) Include the basis for challenging the facts used to determine the failure to comply or the penalty assessment.

(j) *Hearings.* Upon receiving a request for a hearing, DCHD will assign an administrative law judge to the case and promptly give notice of the assignment to the

parties. Thereafter, each filing must be addressed to the administrative law judge and a copy served on each opposing party or its counsel.

(1) To the extent they are not inconsistent with this section, the general rules in 43 CFR part 4, subparts A and B apply to the hearing process.

(2) Subject to the provisions of 43 CFR 1.3, a museum may appear by authorized representative or by counsel and may participate fully in the proceedings. If the museum does not appear and the administrative law judge determines that this absence is without good cause, the administrative law judge may, at his or her discretion, determine that the museum has waived the right to a hearing and consents to the making of a decision on the record.

(3) The Department of the Interior counsel, designated by the Solicitor of the Department of the Interior, represents the Secretary in the proceedings. Within 20 days of receipt of its copy of the written request for hearing, Departmental counsel must file with the DCHD an entry of appearance on behalf of the Secretary and the following:

(i) Any written communications between the Secretary and the museum during any informal discussions under paragraph (e)(1) of this section;

(ii) Any petition for relief submitted under paragraph (e)(2); and

(iii) Any other information considered by the Secretary in reaching the decision being challenged. Thereafter, the museum must serve each document filed with the administrative law judge on Departmental counsel.

(4) In a hearing on the penalty assessment, the amount of the penalty assessment must be determined in accordance with paragraph (c)(2) of this section and will not be limited to the amount originally assessed or by any previous reduction, increase, or offer of mitigation.

(5) The administrative law judge has all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, and to render a decision under 5 U.S.C. 554-557.

(6) The administrative law judge will render a written decision based upon the hearing record. The decision must set forth the findings of fact and conclusions of law, and the reasons and basis for them.

(7) The administrative law judge's decision takes effect as the final administrative decision of the Secretary 31 days from the date of the decision unless the museum files a notice of appeal as described in paragraph (k) of this section.

(k) *Appealing the administrative law judge's decision.* Any party who is adversely affected by the decision of the administrative law judge may appeal the decision by filing a written notice of appeal within 30 days of the date of the decision. The notice of appeal must be filed with the Interior Board of Indian Appeals (IBIA), Office of Hearings and Appeals, U.S. Department of the Interior, at the mailing address specified in the administrative law judge's decision, or by electronic means in accordance with an OHA Standing Order which is available on OHA's website at the web address specified in the administrative law judge's decision. The notice of appeal must be accompanied by proof of service on the administrative law judge and the opposing party. The notice of appeal and any document filed thereafter with the IBIA is subject to the rules that govern the method and effective date of filing in 43 CFR 4.310.

(1) To the extent they are not inconsistent with this section, the provisions of 43 CFR part 4, subpart D, apply to the appeal process. The appeal board's decision must be in writing and takes effect as the final penalty assessment and the final administrative decision of the Secretary on the date that the appeal board's decision is rendered, unless otherwise specified in the appeal board's decision.

(2) OHA decisions in proceedings instituted under this section are posted on OHA's website.

(l) *Exhaustion of administrative remedies.* A museum has the right to seek judicial review, under 5 U.S.C. 704, of the final administrative decision of the Secretary only if it has exhausted all administrative remedies under this section. No decision, which at the time of its rendition is subject to appeal under this section, shall be considered final so as to constitute agency action subject to judicial review. The decision being appealed shall not be effective during the pendency of the appeal.

(m) *Failure to pay penalty or continuing failure to comply.* (1) If the failure to comply continues after the date the final administrative decision of the Secretary takes effect, as described in paragraphs (g), (j)(6), or (k)(1) of this section, or after a date identified in an agreement under paragraph (e)(3) of this section, the Secretary may assess an additional daily penalty amount for each continuing violation not to exceed \$1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74). In determining the daily penalty amount, the Secretary will consider the factors in paragraph (c)(2) of this section. This penalty will start to accrue on the day after the effective date of the final administrative decision of the Secretary or on the date identified in an agreement under paragraph (e)(3) of this section.

(2) If the museum fails to pay the penalty, the Attorney General of the United States may institute a civil action to collect the penalty in an appropriate U.S. District Court. In such action, the validity and amount of the penalty are not subject to review by the court.

(n) *Additional remedies.* The assessment of a penalty under this section is not deemed a waiver by the Department of the Interior of the right to pursue other available legal or administrative remedies.

## **Subpart D—REVIEW COMMITTEE**

### **§ 10.12 Review Committee.**

The Review Committee advises the Secretary and Congress on matters relating to sections 5, 6, and 7 of the Act and other matters as specified in section 8 of the Act. The Review Committee is subject to the Federal Advisory Committee Act (FACA, 5 U.S.C. App.)

(a) *Recommendations.* Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act. Findings and recommendations made by the Review Committee will be published in the *Federal Register* within 90 days of making the finding or recommendation.

(b) *Nominations.* The Review Committee consists of seven members appointed by the Secretary of the Interior.

(1) Three members are appointed from nominations submitted by Indian Tribes, Native Hawaiian organizations, and traditional religious leaders. At least two of these members must be traditional Indian religious leaders. A traditional Indian religious leader is a person who, based on cultural, ceremonial, or religious practices, is recognized by an Indian Tribe as being responsible for performing cultural ceremonies or exercising a leadership role.

(2) Three members are appointed from nominations submitted by national museum organizations or national scientific organizations. An organization that is created by, is a part of, and is governed in any way by a parent national museum or scientific organization must submit a nomination through the parent organization. National museum organizations and national scientific organizations are organizations that:

(i) Focus on the interests of museums and science disciplines throughout the United States, as opposed to a lesser geographic scope;

(ii) Offer membership throughout the United States, although such membership need not be exclusive to the United States; and

(iii) Are organized under the laws of the United States Government.

(3) One member is appointed from a list of more than one person developed and consented to by all other appointed members specified in paragraphs (b)(1) and (b)(2) of this section.

(c) *Findings of fact or disputes on repatriation.* The Review Committee may assist any affected party through consideration of findings of fact or disputes related to the inventory, summary, or repatriation provisions of the Act. One or more of the affected parties may request the assistance of the Review Committee or the Secretary may direct the Review Committee to consider a finding of fact or dispute. Requests for assistance must be made before repatriation of the human remains or cultural items has occurred.

(1) An affected party is either a:

(i) Museum or Federal agency that has possession or control of the human remains or cultural items, or

(ii) Lineal descendant, or an Indian Tribe or Native Hawaiian organization with potential affiliation to the human remains or cultural items.

(2) The Review Committee may make an advisory finding of fact on questions related to:

(i) The identity of an object as human remains or cultural items,

(ii) The cultural or geographical affiliation of human remains or cultural items, or

(iii) The repatriation of human remains or cultural items.



(3) The Review Committee may make an advisory recommendation on disputes between affected parties. To facilitate the resolution of disputes, the Review Committee may:

(i) Consider disputes between an affected party identified in paragraph (c)(1)(i) of this section and an affected party identified in paragraph (c)(1)(ii) of this section;

(ii) Not consider disputes among lineal descendants, Indian Tribes and Native Hawaiian organizations;

(iii) Not consider disputes among museums and Federal agencies;

(iv) Request information or presentations from any affected party; and

(v) Make advisory recommendations directly to the affected parties or to the Secretary.

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